89-1985

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID A. ROSENFELD
875 Battery Street, 3d Fl.
San Francisco, CA 94111

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900
Attorney for California State Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the states are precluded by the preemption provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, from requiring that public works contractors agree to provide training opportunities for apprentices in accord with state-prescribed standards.

2. Whether, under this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 465 U.S. 85 (1983), preemption of a state law that was enacted as part of a cooperative federal/state program under the federal apprenticeship training statute, and that requires contractors to provide training opportunities on public works projects, would "impair a law of the United States" within the meaning of ERISA's "savings clause" (29 U.S.C. § 1144(d)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners California Division of Apprenticeship Standards, *et al.*, defendants in the district court and appellants in the court of appeals, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Northern California Boilermakers Local Joint Apprenticeship Committee, et al. v. Hydrostorage, Inc.*, 891 F.2d 719 (9th Cir. No. 88-2798, December 6, 1989).

OPINIONS BELOW

The opinion of the court of appeals is reported at 891 F.2d 719 and is reprinted in the separately bound appendix to this *certiorari* petition (hereafter App., *infra*) at pp. 1a-28a. The opinion of the district court (App., *infra*, 29a-44a) is reported at 685 F.Supp. 718.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 45a) was entered on December 6, 1989. A timely petition for rehearing was denied on March 16, 1990 (App., *infra*, 46a-47a). The district court had jurisdiction over this matter under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*; the National Apprenticeship Act of 1937 ("Fitzgerald Act"), 29 U.S.C. § 50, and regulations promulgated thereunder, 29 C.F.R. § 29.1 *et seq.*; the California Labor Code § 1777.5, § 1777.7 and §§ 3070-3097; and the California Code of Regulations, 8 C.C.R. § 201 *et seq.* The relevant statutory and regulatory provisions are set forth at App., *infra*, 48a-77a.

STATEMENT OF THE CASE

This case arises out of provisions in the California prevailing wage statute that require employers performing public works contracts for the state or its subdivisions to agree to employ and train apprentices pursuant to state-approved apprenticeship standards. In 1986, respondent Hydrostorage, Inc. was awarded a contract to erect a water storage tank for the Lathrop County Water District in Lathrop, California. Although the contract contained provisions for apprenticeship training in accord with state law, Hydrostorage failed to comply with its promises concerning such training. The state entered an order barring Hydrostorage from bidding on public contracts for one year and assessing a civil penalty. The court below held the state's order to be preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

1. Section 3075.1 of the California Labor Code provides that "[i]t is the public policy of [the] state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost effective, in developing skills needed to perform public services" (App., *infra*, 57a). To that end, under § 1777.5 of the California Labor Code, the state will select as public works contractors only those employers who agree that, whenever workers in an apprenticeable craft or trade are employed, the employer will also employ apprentices "who are in training under [state-approved] apprenticeship standards and . . . apprentice agreements" (App., *infra*, 50a).

"Apprenticeship standards" and "apprentice agreements" are terms of art with specific meaning in the cooperative federal/state scheme governing the promotion of apprenticeship training in skilled trades generally.[1]

---

[1] In the National Apprenticeship Act of 1937, 29 U.S.C. § 50, commonly known as the Fitzgerald Act, Congress directed the Secretary of Labor to "formulate and promote the furtherance of labor standards" for apprenticeship and "to cooperate with State agencies engaged in the formulation of programs of apprenticeship." App., *infra*, 49a. Pursuant to that Act, the Secretary of Labor has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, which are codified at 29 C.F.R. §§ 29.1-29.13 and reproduced in relevant part at App., *infra*, 61a-75a, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting federal minimum standards may be approved by the federal Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes, including as a source of training for apprentices hired on federal public works projects. App., *infra*, 61a-62a.

Consistent with the statutory mandate, the federal regulations enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of state apprenticeship councils ("SACs") in states that have adopted apprenticeship laws and regulations meeting the federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs, and provide that programs meeting the requirements of an approved SAC shall be

Under that scheme, apprenticeship training is conducted by private program sponsors—typically either a joint labor-management apprenticeship committee, a unilateral management or labor committee, or an individual employer—pursuant to written specifications, or standards, approved by the relevant state or federal authority. There may be more than one approved local apprenticeship committee administering apprenticeship standards in a particular area. The terms and conditions of apprenticeship training, including the number of hours an apprentice will work, the wages to be paid, the training program to be provided, and the like, are set forth in a written apprentice agreement between each apprentice and the program sponsor or employer. App., *infra*, 2a-3a, 50a-77a.

To receive state approval in California, apprenticeship standards and apprentice agreements must meet the requirements set by the California Apprenticeship Council ("CAC"), an appointed body which hears appeals from and sets policy for the Division of Apprenticeship Standards ("DAS"). In 1974, the CAC and DAS approved apprenticeship standards for trades involved in the construction of water storage facilities; those standards are contained in a document entitled "Boilermakers Standards of Apprenticeship for Field Construction and Repair in Eight Western States Area" (hereafter "Standards"). App., *infra*, 2a-3a, 34a.

Section 1777.5 of the California Labor Code requires that an employer who is awarded a public works contract must apply to the joint apprenticeship committee administering the applicable apprenticeship standards in the area of the project for approval to employ and train apprentices in accordance with those standards (App., *infra*,

---

deemed to satisfy the federal standards. App., *infra*, 63a-75a. California's apprenticeship law, the Shelley-Maloney Act of 1939, Cal. Labor Code § 3070-3097, is one of 26 state laws that have received federal approval under the Fitzgerald Act scheme.

3a-6a, 31a-33a, 50a-53a).[2] In this case, the Northern California Boilermakers Joint Apprenticeship Committee ("Boilermakers JAC") administers the Standards in the Lathrop area.

Finally, the statutory scheme requires only that a public works contractor *apply* for approval from the local apprenticeship committee; if approval is denied, the employer may perform the contract without conducting apprenticeship training. Section 1777.5 of the California Labor Code requires, however, that upon receiving approval the contract must employ apprentices in a ratio of not less than one apprentice for every five journeymen. App., *infra*, 5a-6a, 32a-33a. The contract between Hydrostorage and Lathrop County incorporated the requirements of § 1777.5. However, Hydrostorage did not apply to the Boilermakers JAC for a certificate of approval to train apprentices, and did not employ apprentices in the ratio established in § 1777.5. App., *infra*, 7a, 34a.

Section 1777.7 of the California Labor Code subjects a contractor to civil penalties and to a one-year debarment from bidding on public works contracts for willful noncompliance with the contract provisions required by that provision. After an administrative proceeding, the DAS found that Hydrostorage had violated § 1777.5 by failing to apply for approval to employ and train apprentices in accordance with the Standards.[3] The CAC

---

[2] Employers who are signatory to a collective bargaining agreement with the International Brotherhood of Boilermakers agree thereby to adhere to the Boilermakers Standards in the employment and training of apprentices. App., *infra*, 2a-4a. Other employers may already have their own single-employer apprenticeship program whose standards have been approved. In either of these cases the employer need not apply to the local joint apprenticeship committee for approval under § 1777.5. Hydrostorage was not signatory to a collective agreement incorporating the Standards, and did not have state approval to operate its own apprenticeship training program. App., *infra*, 3a-4a. Hydrostorage was therefore required to apply for a certificate of approval under § 1777.5.

[3] The administrative complaint had charged that Hydrostorage also failed to make certain monetary contributions required by

ordered that Hydrostorage be barred for one year from bidding on public works contracts in California, and that it pay a civil penalty. App., *infra*, 7a-8a, 34a, 54a.

3. The district court held that this administrative order was preempted by ERISA.[4] That court found that the Boilermakers apprenticeship program, as set forth in the Standards, is an employee benefit plan within the coverage of ERISA, and that the order "relates to" and "regulates" an employee benefit plan, and is therefore preempted under § 514(a) of ERISA, 29 U.S.C. § 1144(a), because the order compels Hydrostorage "to participate in and contribute to the . . . Program." App., *infra*, 34a-36a. The district court found further that the administrative order was not saved from ERISA preemption by § 514(d), 29 U.S.C. § 1144(d)—which precludes preemption that would "impair" a law of the United States—because, in that court's view, § 1777.5 of the California Labor Code "is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired" (App., *infra*, 38a).[5]

---

§ 1777.5, but the DAS found that in fact the employer had made the required payments. App., *infra*, 78a. There is therefore no question in this case concerning any state monetary contribution requirement.

[4] Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Section 514(c)(1) defines the term "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). Section 514(c)(2) then defines the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2).

[5] The district court also found the administrative order to be preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.*, based on the mistaken belief that § 1777.5 required the employer to become party to a collective bargaining agreement. App., *infra*, 41a-44a. The court of appeals did not

4. The court of appeals upheld the judgment of the district court. That court noted that the statutory definition of an employee welfare benefit plan includes a " 'plan, fund or program . . . established . . . for the purpose of providing . . . apprenticeship or other training programs,' " and concluded that both the local apprenticeship training trust fund in the Lathrop area and the Boilermakers Apprenticeship Standards in their entirety constituted ERISA-covered plans. App., *infra*, 16a-19a. The court below stated that, to be preempted, a state law or regulation must both "relate to" an ERISA plan under § 514(a) of ERISA and "purport to regulate" a plan within the meaning of § 514(c)(2). That court reasoned that the "purports to regulate" language of § 514(c)(2) is narrower than the "relate to" language of § 514(a), and thus imposes a substantive limit on the scope of the preemption clause of § 514(a). App., *infra*, 21a. The court below nonetheless found that the administrative order here came within both clauses by "requir[ing] Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan" (App., *infra*, 22a-23a).

In so finding, the court below rejected the argument that, because § 1777.5 of the California Labor Code "applies only when the state is purchasing services in the marketplace, and simply expresses a decision as to the terms upon which the state chooses to do business," that provision represents an exercise of the state's proprietary prerogative as a "market participant," and does not constitute "regulation" of any plan covered by ERISA. App., *infra*, 23a. Citing *Wisconsin Department of Industry v. Gould. Inc.*, 475 U.S. 282 (1986), that court found that "the 'market participation' doctrine reflects the particular concerns underlying the Commerce Clause," but does not apply in determining whether state action is preempted

---

reach the issue of NLRA preemption, and that issue is not raised in their *certiorari* petition.

in a case where Congress has itself passed legislation. App., *infra*, 23a. In addition, the court below found that, because "[t]he state's involvement does not end with the awarding of the contract" but also includes monitoring and enforcing violations of contracts, the requirements of § 1777.5 "amount[] to regulation, not merely 'market participation.'" App., *infra*, 23a-24a.

Finally, the court below found that § 1777.5 is not saved from preemption by ERISA § 514(d) which protects against the impairment of federal law. That court, based on its reading of this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), found that § 514(d) applies only to save state law provisions that are designed to enforce *prohibitions* contained in federal statutes, such as the state provisions at issue in *Shaw* prohibiting conduct also prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The court below concluded that § 514(d) does not reach incidents of "cooperative federalism," such as that embodied in the Fitzgerald Act, wherein state laws promote substantive conduct that federal law affirmatively seeks to encourage; in its view, such a result would amount to "an overbroad reading of *Shaw*." App., *infra*, 24a-27a.

REASONS FOR GRANTING THE PETITION

I. The Question Whether ERISA Preempts The States From Setting Employee Training Requirements And Other Labor Standards In Public Works Contracts Raises A Substantial And Recurring Issue On Which The Court Of Appeals' Law Is In Disarray.

A.(1) The ERISA preemption cases that have been decided by this Court have concerned state regulatory enactments of general application that set norms stating what private parties may lawfully do in their dealings with other parties both private and public. The inquiry has been whether such a state regulation "relates to" the operation of employee benefit plans, either directly or in-

directly, in a way that transgresses ERISA's prohibition on such "conflicting or inconsistent State and local regulation," (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983)).

The decision below, in contrast, extends the preemptive reach of ERISA to a state rule that applies *only* to transactions in which the state is purchasing services in the marketplace; *viz.*, to a rule that private parties may ignore unless and until those parties voluntarily contract with the state.

The particular apprenticeship training requirement involved here, for example, reflects the state's interest in using its resources to stimulate development of a skilled workforce available for employment on future public projects. By requiring that all employers who contract to build public projects with public funds participate in training apprentices, the state increases the number of trained craftmen in the workforce; ensures in particular that training occurs on the kinds of projects typically contracted for by public entities; and protects those employers who do participate in the training of future skilled workers from a disadvantage in bidding on public contracts based on a difference in apprenticeship costs.

Nothing in the state's apprenticeship standards for public contractors requires that the contractors violate any substantive ERISA requirement, and *nothing* in those standards goes beyond requirements that private contractors could lawfully set in letting their own contracts.

The decision below nonetheless *precludes* the states from purchasing apprenticeship training on the foregoing terms, and may well preclude the states from enforcing other kinds of contract provisions pertaining to apprenticeship training on public works.[6] The scope of the deci-

---

[6] Indeed, recent decisions have found preempted apprenticeship training provisions in public works procurement statutes in Washington and Nevada. *Local 598 Plumbers and Pipefitters Industry*

sion is not, moreover, limited to apprenticeship training requirements. Many states require as part of their prevailing wage statutes that contractors doing work for the state pay wage "supplements" reflecting the costs of various other employee benefits.[7] Such requirements, no less than the apprenticeship training requirement involved here, are a traditional exercise of the states' proprietary power to set standards in the labor market from which

---

Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir.), *affd. summ.*, —— U.S. ——, 109 S. Ct. 210 (1988) (ERISA preempts a Washington statute requiring a public works contractor to pay the prevailing rate of contributions to a local apprenticeship training fund as part of the "prevailing rate of wage" in the relevant locality); *Associated Builders and Contractors, Inc. v. MacDonald*, 11 EBC (BNA) 2625 (D. Nevada 1989) (ERISA preempts a Nevada requirement that public works contractors pay the prevailing journeymen's wage to apprentices unless the employer employs apprentices pursuant to a state-approved apprenticeship training program).

[7] The following states require the payment of prevailing wage supplements by public works contractors:

Alaska, Alaska Stat. § 36.95.010(7) (1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen. Stat. § 31-53 (1987); Hawaii, Haw. Rev. Stat. § 104-1 (1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 395-2 (Smith-Hurd 1986); Kansas, Kan. Stat. Ann. § 44-201; Kentucky, Ky. Rev. Stat. Ann. § 337.505 (Bladwin 1983); Maryland, Md. State Fin. & Proc. Code § 17.208 (1988); Massachusetts, Mass. Gen. Laws Ann. ch. 149, § 27 (West 1982); Michigan, Mich. Comp. Laws § 408.552 (1985); Minnesota, Minn. Stat. Ann. 177.42 (West 1989); Missouri, Mo. Ann. Stat. § 290-210 (Vernon 1989); Montana, Mont. Code Ann. § 18-2-403 (1989); Nevada, Nev. Rev. Stat. § 338.010 (1989); New Jersey, N.J. Stat. Ann. § 13-4-11 (1989); Ohio, Ohio Rev. Code Ann. § 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40, § 276a-5 (West 1980); Oregon, Or. Rev. Stat. § 279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43, § 165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws § 37-13-6 (1984); Texas, Tex. Lab. Code Ann. § 5159a (Vernon 1987); Washingon, Wash. Rev. Code Ann. § 39.12.010 (1972); Wisconsin, Wis. Stat. Ann. § 103.39 (West 1988); Wyoming, Wyo. Stat. § 27-4-405 (1977).

the states draw for public works employment. Yet the principle applied by the lower court could lead to ERISA preemption of those requirements as well.[8]

Recognizing the importance of safeguarding the states' right to contract for goods and services free of federal constraints, this Court has on several occasions considered whether the Commerce Clause of the Constitution standing alone interferes with the states' freedom in the market; distinguishing state regulatory actions from state market participation, the Court has concluded that there is no Commerce Clause constraint on the latter. *See White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v, Alexandria Scrap Corporation*, 426 U.S. 794 (1976)). At the same time, in a case under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* —*Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986)—the Court concluded that under the particular circumstances involved, the regulation/market participation distinction was not controlling in deciding the statutory preemption issue there presented.

This case presents the opportunity to consider, in an entirely different statutory context than the one in *Gould*, whether the regulation/market participation distinction developed in the Commerce Clause cases applies, as well, in statutory preemption cases and, if so, under what circumstances. The fact that this question arises in an ERISA context makes it particularly significant. Given the predominance of employee benefit plans in the modern economy, the states, in making purchasing and contracting decisions are likely for any of a myriad of reasons—having to do with concern for the health and welfare

---

[8] *See General Electric Company v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. den.*, —— U.S. ——, 58 L.W. 3767 (June 4, 1990) (holding prevailing wage provisions preempted by ERISA insofar as such provisions affect employee benefit plans, and doing so without discussing § 514(c)(2) whose pertinence we demonstrate at pp. 12-15 *infra*.)

of employees working on public works jobs, or, as here, the state's self-interest in assuring a skilled workforce—to consider the nature of the contractors' benefit programs in letting contracts.

(2) Review of the decision below also is required to resolve the substantial confusion that has developed in the court of appeals law over the proper role—and the proper construction—of ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2), in preemption litigation generally.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Section 514(c)(2) in turn, defines "State" for purposes of § 514 generally as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which *purports to regulate* . . . employee benefit plans . . ." (emphasis supplied).

The question of the proper interaction of these two sections, and the further question of the precise meaning of § 514(c)(2), are critical to the development of the ERISA preemption doctrine. And those questions are ones this Court has not yet addressed in any detail, and upon which the court of appeals' decisions are in disarray.[9]

On the one hand, most courts continue to ignore the "purports to regulate" language of § 514(c)(2) entirely in ERISA preemption cases, and to approach the question whether a state rule is preempted purely as a question of whether the rule "relates to" an employee benefit plan under § 514(a).[10] This approach serves to *expand*

---

[9] The only case in this Court even touching on the interplay of § 514(a) and § 514(c)(2) is *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981) (relying on § 514(c)(2) to support the conclusion that § 514(a) reaches "indirect action bearing on private pensions.")

[10] *See, e.g., Fitzgerald v. Codex Corp.*, 882 F.2d 586, 587-88 (1st Cir. 1989); *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989);

ERISA's preemptive effect since the "relates to" analysis, as this Court stated in *Shaw v. Delta Air Lines, Inc.*, *supra*, requires an inquiry only into whether the state rule "has a connection with or reference to such a plan," or whether instead the relationship is "too tenuous, remote, or peripheral . . . to warrant a finding of 'relates to' the plan." 463 U.S. at 97, 100 n.21.

Other courts, including the court below, have held that the "purports to regulate" language of § 514(c)(2) does, indeed, *limit* the preemptive scope of ERISA, by imposing an additional requirement for preemption to the "relates to" requirement of § 514(a).[11]

At the same time, even those courts that have determined that § 514(c)(2) does limit the scope of § 514(a) have failed to flesh out the substance of that limitation in any consistent, meaningful way. For example, although the court below found that § 514(c)(2) imposes an additional and more confining test for preemption than does § 514(a), that court offered no sensible view of what the "purports to regulate" language actually *adds* to the "relates to" test, and ultimately found that the California apprenticeship training provision "purports to regulate" employee benefit plans for no reason other than that the

---

Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F.2d 419, 421 (4th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986); *MacLean v. Ford Motor Co.*, 831 F.2d 723, 727 (7th Cir. 1987); *Baxter v. Lynn*, 886 F.2d 182, 184 (8th Cir. 1989); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1563 (11th Cir. 1987).

[11] The Ninth and the Second circuits have expressed this view. *See Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir. 1986) ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA); *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 & n.1 (2d Cir. 1984), *cert. den.*, 472 U.S. 1008 (1985); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *affd. mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983).

provision "relates to" such plans. App., *infra*, 21a-23a. *See also Rebaldo v. Cuomo*, 749 F.2d at 137 n.1.[12]

The most elementary canons of statutory construction indicate, too, that Congress meant to add something of substance to § 514(a)'s requirements in defining "State" in § 514(c)(2) not only according to the kind of entity covered, but *also according to whether or not that entity "purports to regulate" an employee benefit plan. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)"). And reading §514(c)(2)'s language as referring to the established distinction between state regulation and state market place participation is, for the reasons developed below, both sensible and consistent with this Court's cases. See pp. 16-21, *infra*.

Standing alone, the "relates to" language of § 514(a) is so imprecise as to provide little guidance to the courts in determining ERISA preemption questions. Congress apparently so recognized, and therefore provided that guidance in part in § 514(c)(2). Until this Court settles the meaning of § 514(c)(2), the confusion in the lower courts as to the scope of ERISA's preemption provisions taken as a whole will continue. To elucidate the inter-

---

[12] The Sixth Circuit, without deciding the question, has criticized the view that the "purports to regulate" language of § 514(c)(2) provides a substanitve limitation on the scope of § 514(a). *Authier v. Ginsburg*, 757 F.2d 796, 799 n.4 (6th Cir.), *cert. den.*, 474 U.S. 888 (1985); *see Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 552-53 n.1 (6th Cir. 1987). Similarly, the Fifth Circuit, while noting the Ninth and Second Circuits' view, has expressly declined to adopt the position that the "purports to regulate" language of § 514(c)(2) limits the preemptive reach of ERISA. *Ironworkers Mid-South Pension Fund v. Tero-technology*, 891 F.2d 548, 552 (5th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Plan v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467 n.9 (5th Cir. 1986).

relation of § 514(a) and § 514(c)(2) while addressing the important practical question of the application of ERISA's preemption provisions to a wide range of state contract requirements, the Court should grant review in this case.[13]

B. As we indicated at the outset the ERISA preemption question presented here requires the reconciliation of two lines of authority in this Court concerning the extent to which federal statutory enactments restrict the states in their role as market participants. We develop that point at this juncture and in so doing show why the decision below is wrong.

This Court has once before addressed a claim of federal statutory preemption in connection with labor-related standards imposed in a state contract for the procurement of goods or services. In *Wisconsin Department of Industry v. Gould, Inc., supra,* the Court held that the National Labor Relations Act preempts a Wisconsin statute barring repeat violators of the NLRA from doing business with the state.

---

[13] In *General Electric Company v. New York State Department of Labor, supra,* the Second Circuit held that ERISA preempts a New York state requirement that public works contractors pay, in addition to wages at the prevailing rate, fringe benefits or their equivalent in cash supplements "in accordance with the prevailing practices in the same trade or occupation in the locality" where the contract is to be performed. The Second Circuit's decision is of a piece with the decision below insofar as both find ERISA to preempt traditional labor standards specifications in state public works contracts. In *General Electric,* however, the state did not raise, and the decision did not consider, the issue whether the "purports to regulate" language of § 514(c)(2) limits the scope of ERISA preemption as applied to a state procurement contract requirement; instead that decision analyzed the New York prevailing wage statute *solely* under the "relates to" language of § 514(a). Thus, this case, unlike *General Electric,* presents a vehicle for addressing on a generic basis the application of ERISA preemption principles to state procurement statutes.

The court below read *Gould* as standing for the broad proposition that *any* Congressional action preempting a certain substantive area of state employment regulation applies as a matter of law to state actions as a purchaser of goods and services. We believe that this vastly overreads *Gould*, which in fact stands for a much narrower approach to the federal preemption of state procurement activities.

(1) As noted above the *Gould* Court started from the proposition, established in a series of decisions under the "dormant" Commerce Clause, that a state is generally free, in its role as "market participant," to set the terms on which the state will contract for goods and services with private parties, and that a state in filling that role may require contract terms, including labor-related terms, that the state might not be free to impose by across-the-board regulation. *See* 475 U.S. at 289, *citing White v. Massachusetts Council of Construction Employers, supra; Reeves, Inc. v. Stake, supra; Hughes v. Alexandria Scrap Corporation, supra.* The basis for this freedom is that legal rules restricting "state regulatory measures impeding free private trade in the national marketplace" have no necessary application to "the ability of the States themselves to operate freely" in that marketplace. *Gould*, 475 U.S. at 289, *quoting Reeves*, 447 U.S. at 437.[14]

The *Gould* Court found, however, that in enacting its debarment rule "Wisconsin 'simply [was] not functioning as a private purchaser of services,'" so that, "for all practical purposes, Wisconsin's debarment scheme [was] tantamount to regulation." 475 U.S. at 289. There is no indication in the NLRA, said the Court in *Gould*, that

---

[14] Moreover, in *White v. Massachusetts Council of Constructions Employers*, the Court discussed, in particular, state procurement rules concerning the employees of contractors on public works and noted that the employees of such contractors are "in a substantial if informal sense, 'working for the [state].'" 460 U.S. at 211 n.7.

Congress intended to allow a state to enact such a purely regulatory regime in the guise of a procurement statute.

Three principles guided this Court to its conclusion in *Gould*. First, as the Court made clear, in determining whether a particular form of state activity is preempted by a federal labor statute, Congressional purpose is the ultimate "touchstone" as it is in any preemption analysis (475 U.S. at 290), and that purpose must be gleaned from the *particular* state and federal statutory schemes at issue. As the Court explained:

> We do not say that state purchasing decisions may never be influenced by labor considerations . . . . Doubtless some state spending policies, like some exercises of the police power, address conduct . . . such . . . that preemption should not be inferred. And *some spending determinations that bear on labor relations were intentionally left to the States by Congress.* [475 U.S. at 291 (citations omitted, emphasis supplied).] [15]

Second, in determining Congressional intent, the *Gould* Court considered whether the state statute in question "can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291. Because the Wisconsin scheme

---

[15] Indeed, the Court has explained in another context that federal statutes which would preempt state *regulatory* action will often *not* preempt state action taken in a *purely proprietary* capacity. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973) (federal airport noise control legislation that was intended to occupy the field of state and municipal airport noise regulation did not preclude a municipality from setting noise requirements in its capacity "as the proprietor of an airport). *See also Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 2901 (1988) (suggesting that a city acting in its proprietary capacity could insist, in a franchise agreement for the operation of an oil pipeline, on safety requirements greater than those imposed by the federal Hazardous Liquid Pipeline Safety Act, notwithstanding the otherwise broad preemptive scope of the federal act).

was addressed to employer conduct unrelated to the employer's performance of any contractual obligations to the state and unrelated to the specific objects of any state purchasing decision, the *Gould* Court concluded that the state law was only in form a procurement statute.[16]

Finally, the Court in *Gould* held that the distinction between regulation and market participation "reflects the particular concerns underlying the Commerce Clause;" *viz.*, the concerns in maintaining a *national* marketplace in which private parties can operate, without restricting the ability of the states to participate in that marketplace coequally with private parties. *See* 475 U.S. at 289. By contrast, said the *Gould* Court, the NLRA was designed to create and protect an affirmative and comprehensive federal regulatory regime, so that the question "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place." *Id.* at 290.

Applying these three principles, the *Gould* Court concluded that there is no affirmative indication that Congress intended in *enacting the NLRA* to preserve statutes such as the one at issue there (475 U.S. at 290); that the Wisconsin statute in truth constituted a state effort to "enforce the requirements of the NLRA" (*id.* at 291); and that the state statute interfered with the "'interrelated federal scheme of law, remedy, and administration'" which Congress intended to commit exclusively to the National Labor Relations Board, (*id.*, *quoting San*

---

[16] *See*, applying a similar distinction between state regulation and state market participation in a Commerce Clause context, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984) (Alaska's interest as a market participant was limited to the "immediate transaction" involving the purchase of timber; conditions imposed on the manner in which timber is processed after the purchase is completed amounted to "downstream regulation of the timber-processing market in which [the state] is not a participant.")

Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

(2) The three considerations the Court regarded as determinative in *Gould* all point in precisely the opposite direction here.

First, the language Congress wrote into ERISA's preemption provisions is, as the Court has observed, "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). The choice of the term "purports to *regulate*" in ERISA § 514(c)(2)—which does not appear in the NLRA or in the preemption language of any other federal statute of which we are aware—is therefore entitled to particular weight; giving that term its ordinary meaning leads ineluctibly to the conclusion that Congress meant that *only* regulatory acts, as regulation is commonly understood under federal law, and not state proprietary or market participant acts, are preempted by ERISA.

Second, the state procurement rule here at issue relates directly to how the particular contract being let is to be carried out, and not to what the contracting party did at some other time in some other place. Because § 1777.5 of the California Labor Code, unlike the Wisconsin debarment statute in *Gould*, plainly rests on perfectly legitimate "local economic needs" (475 U.S. at 291) which the provision requiring apprentice training is intended in part to serve, the California statute is not regulation in disguise, but rather a legitimate expression of the state's procurement requirements.

Third, unlike the species of NLRA preemption involved in *Gould*, preemption under ERISA is intended to serve the same general purposes as does the dormant Commerce Clause. ERISA preemption—in contrast to NLRA preemption—is not primarily concerned with regulating the content of benefit plans or even with protecting an affirmative regulatory scheme. Instead, ERISA pre-

emption is concerned with preserving uniformity in national markets by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). *See Shaw v. Delta Air Lines*, 463 U.S. at 98-100, 105; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987).

Thus, for the purposes of both dormant Commerce Clause analysis *and* ERISA preemption analysis, it is the ability of market participants to operate freely in the national market that is to be protected, and there is no reason to preclude the states, when participating in that market, from taking actions open to private market participants. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 809; *Reeves v. Stake*, 447 U.S. at 436-39. Where a state can pursue its marketplace interests without interfering with any affirmative federal policy, it must be assumed that Congress did not intend to impede the state's " 'right . . . freely to exercise [its] own independent discretion as to parties with whom [it] will deal.' " *Id.* at 439.[17]

The Ninth Circuit, in short, read *Gould* much too broadly, and by so doing denied the states operating as

---

[17] The court below also found that the state was engaged in regulation by enforcing the specification contained in the contract that Hydrostorage agreed to and executed. This conclusion is directly contrary to this Court's decision in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). *Perkins* specifically held, in a case involving a federal prevailing wage statute, that enforcement of contracts specifying labor standards for employees of a government contractor "does not represent the exercise by [the government] of regulatory power over private business or employment." *Id.* at 127. The Court concluded that fixing and enforcing labor standards in government contracts is not regulation because "[l]ike private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.*

market participants the freedom this Court's cases allow; its erroneous decision should not be allowed to stand.

II. The Ninth Circuit's Conclusion That State Apprenticeship Statutes Are Preempted By ERISA Despite A Federal Statutory Scheme That Promotes State Programs Regarding Apprenticeship Raises Important Issues Concerning The Reach Of § 514(d) Of ERISA, As Interpreted By This Court In *Shaw v. Delta Airlines*, 465 U.S. 85 (1983), To Federal-State Cooperative Programs.

Even if benefit plan-related specifications in state public works contracts may be said generally to come within the preemptive scope of ERISA, the particular apprenticeship training scheme at issue here is valid as part of the cooperative state/federal scheme for promoting apprenticeship training called for by the Fitzgerald Act. The Ninth Circuit's failure to uphold the apprenticeship training scheme on that basis was grounded in an unduly cramped reading of § 514(d) of ERISA, 29 U.S.C. § 1144(d) (the "savings clause") squarely at odds with the principles set forth in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). If permitted to stand, the lower court's reading of § 514(d) will substantially inhibit the national program of apprenticeship training in which more than half the states participate. This aspect of the decision below—which as we now show is seriously flawed in its reasoning—independently warrants this Court's review.

Section 514(d) of ERISA provides that "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." The court of appeals found that § 1777.5 of the California Labor Code—while *promoting* the goals of the joint federal/state program of apprenticeship training under the Fitzgerald Act—does not constitute an "enforcement scheme" for federally-enacted substantive law. Reading

this Court's decision in *Shaw v. Delta Airlines, supra,* as confining the reach of § 514(d) to state statutes that directly enforce federal substantive law, the court of appeals held that § 514(d) does not save state statutes from preemption even where federal law affirmatively promotes, and specifically approves, the innovative state action sought to be preempted.

A. Congress in enacting the preemption language of ERISA, recognized that many federal statutes deal directly or indirectly with the workplace and may affect ERISA-covered plans. The language of § 514(d)'s savings clause was included in ERISA to express Congress' intent to preserve such federal statutory schemes from being undercut by ERISA preemption.

Shaw v. Delta Air Lines, Inc., supra, presented the one occasion the Court has had to consider the proper scope of § 514(d) as applied to a federal statutory scheme that relies in some respect upon *state* law to achieve a federally-prescribed employment goal. Specifically, in *Shaw,* the Court considered the relationship between a state fair employment law and the comprehensive federal anti-discrimination scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The state law in question contained certain provisions that were congruent with the prohibitions of Title VII, and other provisions that went beyond Title VII and prohibited employment practices with respect to which Title VII was neutral.

The *Shaw* Court held that, as applied to benefit plans, state law that is substantively congruent with Title VII, even if otherwise within the preemption language of § 514(a), is saved from preemption under § 514(d), because to preempt such laws would "impair" the federal goal "of encouraging joint state/federal enforcement of Title VII." 463 U.S. at 102. With respect to state law that prohibits conduct which Title VII views with neutrality, however, the Court found preemption under

§ 514(a) would not impair federal law and is therefore proper. *Id.* at 103-04. As the Court concluded, "[w]e have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther. . . ." *Id.* at 103 n.24.

The decision in *Shaw* confirms that, at a minimum, § 514(d) protect state laws from preemption where the law in question is a means of furthering the state's assigned role in a cooperative federal/state statutory scheme. And *Shaw* suggests further that whether a particular state law in a particular federal/state scheme is saved under § 514(d) will turn on an analysis of the federal goals and the ways in which those goals are served by the state law. Indeed, the Court made quite clear that, if there were "language or legislative history" suggesting a federal interest in having the states go beyond minimum federal standards, such evidence would be highly relevant to the application of § 514(d). *See* 463 U.S. at 103 n.24.

B. The Fitzgerald Act is a bare-bones enabling act, granting authority to the Secretary of Labor

> to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, [and] *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.* . . . [29 U.S.C. § 50 (emphasis added)].

Both the federal statute and the Labor Department regulations leave to the states the primary administrative responsibility for certifying local apprenticeship programs as meeting the minimum federal standards (*see* n.1 *supra*) and for adopting, if the states so choose, poli-

cies and procedures which impose requirements in addition to the minimum apprenticeship requirements prescribed by the Labor Department. 29 C.F.R. § 29.12(a)(5).[18]

Thus, the language and structure of the Fitzgerald Act demonstrate a federal policy of encouraging the states to go *beyond* federal minimums, and a policy of granting flexibility to the states in so doing.[19] In this respect, the federal statute is similar to many other federally enacted programs that set general policy goals and standards, but otherwise rely on the states to advance and administer the federal interests in various ways.[20] To preempt a state law that is in furtherance of such a federal scheme by the operation of § 514 of ERISA certainly "impairs"

---

[18] Congress has specifically encouraged, and in some instances required, the employment and training of apprentices on federal public works projects in a manner quite similar to the way in which § 1777.5 of the California Labor Code accomplishes those objectives with respect to state projects. *See Siuslaw Concrete Construction Co. v. State of Washington Dept. of Transportation*, 784 F.2d 952, 958 (9th Cir. 1986) (mandating training of apprentices on federal of federally assisted highway construction projects); Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-7; Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332; 29 C.F.R. §§ 5.1-.17 (permitting employment of apprentices at less than prevailing wage on federally financed and assisted construction, where apprentices are trained under approved apprenticeship standards).

[19] *See Rebaldo v. Cuomo, supra* (§ 514(d) applied to an experimental state Medicaid program; Congress had authorized the states to engage in innovative and experimental projects in carrying out their role under the federal Medicaid statute) (opinion of Van Graafeiland, J.).

[20] *See, e.g.*, The Job Training Partnership Act, 29 U.S.C. § 1501 *et seq.*; The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq. See generally Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177 n.28 (1978) (recognizing that some federal statutes reflect an explicit reliance upon federal/state cooperation, and indicating that, where that is the case, the flexible role ascribed to the states is to be regarded as part of the federal statutory scheme for preemption purposes.)

and "modifies" the federal statute, by limiting the range of the states' inventiveness in furthering the federal program's goals, and such a result is thus contrary to §514 (d)'s plain "savings clause" language.

Indeed, this Court has cautioned that generally, "ERISA preemption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' " *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 19, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522. In the absence of clear evidence to the contrary, it must be presumed that Congress "did not intend to preempt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

State apprenticeship training requirements in public works of the kind at issue here are a central part of state prevailing wage laws that have heretofore been considered to be a "valid and unexceptional exercise of the [states'] police power." *Metropolitan Life*, 471 U.S. at 758.[21] Particularly given the degree to which the Fitzgerald Act relies on state programs as a means of encouraging apprenticeship, including the training of apprentices on public works, ERISA preemption of state apprenticeship training requirements would impair the federal statutory scheme stated in the Fitzgerald Act in the precise way § 514(d) was intended to prevent. By reading *Shaw* as nonetheless precluding enforcement of state substantive law enacted in furtherance of cooperative federalism programs such as the one at issue here, the court of appeals

---

[21] The most recent federal decision to consider a state apprenticeship training rule, implicitly rejected the decisions that have held such rules preempted in public works contracts, and held that a state standard governing the training of apprentices is "a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs." *Boise Cascade Corporation v. Peterson*, Civil 4-90-48 (D. Minn. April 27, 1990), slip op. at 17.

decided an imporant question of federal-state relations in a way that merits this Court's attention.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. ROSENFELD
875 Battery Street, 3d Fl.
San Francisco, CA 94111

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900
Attorney for California State Petitioners

89-1985
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID A. ROSENFELD
875 Battery Street, 3d Fl.
San Francisco, CA 94111

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390

Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900

Attorney for California State Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

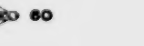

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-2798, 88-2800, 88-2802, 88-2966,
88-2968 and 88-2969

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

v.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capacity as Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted May 8, 1989
Decided Dec. 6, 1989

John M. Rea, Chief Counsel, Dept. of Indus. Relations, Miles Washington, Deputy Atty. Gen., David A. Rosenfeld, Van Bourg, Weinberg, Roger & Rosenfeld, and Marsha S. Berzon, Altshuler & Berzon, San Francisco, Cal., for defendants-appellants.

Karen E. Ford, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for plaintiff-appellee; James P. Baker, San Francisco, Cal., on brief.

Before WALLACE and NOONAN, Circuit Judges, and BURNS,* District Judge.

WALLACE, Circuit Judge:

In these consolidated appeals, the Northern California Boilermakers Joint Local Apprenticeship Committee, California Apprenticeship Council, and California Division of Apprenticeship Standards (collectively Boilermakers) appeal from the district court's summary judgment in favor of Hydrostorage, Inc. (Hydrostorage). The district court enjoined the enforcement of an administrative order against Hydrostorage, concluding that such enforcement was preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a), and by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* On appeal, Boilermakers argue that the district court (1) lacked subject matter jurisdiction, (2) erred in failing to abstain under either the *Younger* or *Pullman* doctrines, and (3) erred in granting summary judgment based on ERISA and NLRA preemption. The district court exercised jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

This case arises out of California's efforts to regulate apprenticeship on public works projects. Cailifornia's general administrative framework for regulating apprenticeships is complex. The California Apprenticeship Council (Council) is a six-member entity created by state statute and empowered to issue rules and regulations establishing minimum standards of wages, hours, and

---

* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

working conditions for apprentices. Cal. Labor Code §§ 3070, 3071 (West Supp.1989). The Council is located in the Division of Apprenticeship Standards (Division), which in turn is part of California's Department of Industrial Relations. *Id.* The Director of Industrial Relations serves as the Administrator of Apprenticeship (Administrator), in which capacity he or his delegees carry out such duties as investigating and determining charges of alleged violations of the terms of apprenticeship agreements. Cal. Labor Code §§ 3072, 3081 (1971); 8 Cal. Code § 202 (1988). A determination by the Administrator may be appealed to the Council. Cal. Labor Code § 3082 (West Supp.1989); 3 Cal.Code Reg. § 203 (1988).

The Division approves written apprenticeship standards which are submitted to it, if those standards conform to the Council's minimum requirements. Cal. Labor Code § 3073 (West Supp.1989); 8 Cal.Code Reg. § 212 (1988). Standards of apprenticeship may be submitted for approval by any "apprenticeship program sponsor," which includes joint apprenticeship committees, unilateral labor or management apprenticeship committees, or individual employers. Cal. Labor Code § 3075 (West Supp.1989). For the craft of boilermaker, the Council in May 1974 approved a set of apprenticeship standards contained in a document entitled "Boilermakers Standards of Apprenticeship for Field Construction and Repair in Eight Western States Area" (Standards). Subsequent to 1974, the Standards were amended to implement an equal employment opportunity program approved by the Division.

An employer in California may gain the right and responsibility to train Boilermaker apprentices in either of two ways. Employers who are signatory to the collective bargaining agreement with the relevant union—the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (Union)—become bound to the Standards by virtue of a clause in the collective bargaining agreement which so stipulates. On the other hand, employers who are not parties to the

collective bargaining agreement (such as non-union contractors or contractors signatory to some other collective bargaining agreement) must apply to a local joint apprenticeship committee for approval to train on public workers projects in accordance with the Standards. Cal. Labor Code § 1777.5 (West Supp.1989); 8 Cal.Code Reg. § 229 (1988). Contractors approved to train by the joint apprenticeship committee are sent a certificate of approval.

Hydrostorage, a Tennessee corporation, is not a signatory to the Union's collective bargaining agreement. Hydrostorage is a contractor engaged in the construction of water storage facilities. Much of Hydrostorage's work consists of public works projects. In the fall of 1986, Hydrostorage was awarded a public works contract to construct a water storage tank for the Lathrop County Water District in Lathrop, California (Lathrop project).

The State of California imposes certain conditions relating to apprentices upon contractors and subcontractors who perform contracts awarded by the state or its political subdivisions. *See* Cal. Labor Code § 1777.5 (West Supp.1989).[1] Under section 1777.5 of the California

---

[1] Section 1777.5 of the Labor Code provides in part:

> Every . . . apprentice [employed on a public works project] shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.
>
> Only apprentices . . . who are in training under apprenticeship standards and written apprentice agreements . . . are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.
>
> When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or

Labor Code, contractors, with certain exceptions not relevant to this case, must (1) "apply to the joint apprenticeship committee administering the apprenticeship

---

trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contract of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts

standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected"; (2) employ apprentices in a ratio of no less than one apprentice for every five journeymen; and (3) "contribute to the fund or funds in each craft or trade in which [the contractor] employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do." *Id.* As for the contribution requirement, if apprenticeship "trust fund administrators are unable to accept [the] funds, contractors not signatory to the trust agreement" must pay "a like amount to the California Apprenticeship Council." *Id.*

The Northern California Boilermakers Local Joint Apprenticeship Committee (Committee) administers the approved apprenticeship standards for the boilermaker craft in the Lathrop area. The Committee is composed of

---

of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

. . . .

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs juourneymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract.

equal numbers of persons appointed by labor and management. *See* Cal. Labor Code § 3075 (West Supp.1989).

For willful noncompliance with section 1777.5's requirements, a contractor is subject to civil penalties and debarment from bidding on public works contracts for one year. *Id.* § 1777.7. The parties do not dispute that section 1777.5 applies to the Lathrop project, or that Hydrostorage neither applied to the Committee for a certificate of approval nor employed any apprentices on the project.

On September 25, 1986, the Committee filed a complaint regarding the Lathrop project with the Division. The Division investigated the allegations and issued an administrative complaint against Hydrostorage on January 26, 1987. The administrative complaint alleged that Hydrostorage had violated section 1777.5 by failing to (1) apply for permission to employ and train apprentices, (2) make timely contributions to the apprenticeship trust fund, and (3) employ apprentices in the legally required ratio. The complaint was scheduled to be heard before a hearing officer on May 14, 1987.

On May 13, one day before the administrative hearing was scheduled to take place, Hydrostorage filed an action in federal court, seeking a declaration that section 1777.5 was preempted by ERISA and the NLRA. Hydrostorage also sought a preliminary injunction against the administrative proceedings. At a hearing on May 13, 1987, the district judge refused to issue a temporary restraining order (TRO) against the administrative hearing. The administrative hearing took place as scheduled on the following day.

After various motions were filed in the federal action, the district court entered an order of abstention on September 25, 1987, based upon the existence of pending state judicial or administrative proceedings.

Two days later, on September 27, 1987, the administrative determination was issued. The Director of the Divi-

sion found that Hydrostorage had willfully violated section 1777.5 "by failing to apply to the [Committee] for approval to train apprentices in the Lathrop Project [and] by failing to employ the mandatory ratio of apprentices to journeymen on the Lathrop project." The Director ordered Hydrostorage barred from bidding on public works contracts for one year and assessed a civil penalty. *Id.*

Although the administrative complaint had alleged that Hydrostorage had violated section 1777.5 by "fail[ing] to make timely contributions to the training fund or the California Apprenticeship Counsel," the Division found no willful violation of this charge. Instead, the Division regarded Hydrostorage's contributions to the Council, a state agency, as sufficient to satisfy the statutory requirement.

Hydrostorage filed a timely administrative appeal of the determination to the Council's Appeal Board. *See id.* § 3082. The Council issued its decision on January 28, 1988, reversing the administrator's determination that Hydrostorage had *willfully* failed to train apprentices in the required ratio, but affirmed the determination that Hydrostorage had willfully failed to apply for approval to train apprentices.

Hydrostorage then returned to federal district court. On March 3, 1988, Hydrostorage filed an amended complaint in its original action and again sought a TRO, this time to prevent the Council's decision from being enforced. Hydrostorage also filed a second federal action alleging virtually identical claims and asserting subject matter jurisdiction under both diversity and federal question statutes. In the second action, Hydrostorage sought an injunction as well as a writ of mandate pursuant to California Code of Civil Procedure § 1094.5, which permits review in state court of final administrative orders. *See* Cal. Civil Proc.Code § 1094.5 (West Supp. 1989).

A hearing on the TRO application was held on March 3, 1988, before the district judge presiding over Hydrostorage's original action. The judge denied Hydrostorage's request for a TRO, stayed the effect of the Council's administrative order, ordered Hydrostorage's two actions consolidated, and scheduled a hearing on Hydrostorage's motion for summary judgment for April 15.

After the hearing, on May 4, 1988, the district court, in a published opinion and order, granted Hydrostorage's motion for summary judgment in the consolidated cases. *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718 (N.D.Cal.1988). The court's ruling was based on two independent grounds: the administrative order was preempted both by ERISA and by the NLRA. *Id.* at 720-25. The court was careful not to rule on whether section 1777.5 was preempted by either ERISA or the NLRA. *See id.* at 723 ("The Court has not been asked to strike down § 1777.5 nor does it do so by this order which holds only that *as applied in this case* it is preempted by ERISA." (emphasis added); *id.* at 725 ("Because application of the [administrative] determination and order would in this case have th[e] effect [of requiring Hydrostorage to become a party to a collective bargaining agreement] it is barred by the NLRA . . . ."). From this summary judgment, the Committee, Division, and Council filed separate timely appeals, which were consolidated.

II

Boilermakers first argue that the district court lacked subject matter jurisdiction. This issue presents a question of law which we review de novo. *Guadamuz v. Bowen*, 859 F.2d 762, 766 (9th Cir.1988).

The district court did not explain why it had subject matter jurisdiction under 28 U.S.C. § 1331, but merely cited footnote 14 of *Shaw v. Delta Air Lines, Inc.*, 463

U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (*Shaw*). 685 F.Supp. at 719. *Shaw* involved a challenge to two New York statutes governing pregnancy benefits on the grounds that they were preempted by ERISA. *Shaw*, 463 U.S. at 88, 103 S.Ct. at 2895. Plaintiffs were employers who maintained ERISA employee benefit plans which provided certain medical and disability benefits. *Id.* at 92, 103 S.Ct. at 2897. In a footnote, the Court explained:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust* [463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* preempted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.
>
> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-62 [28 S.Ct. 441, 454-55, 52 L.Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Id. at 96 n. 14, 103 S.Ct. at 2899 n. 14 (citations omitted) (emphasis in original).

The Council attempts to distinguish *Shaw* by arguing that unlike the plaintiffs there, Hydrostorage is not an

"employer" within the meaning of ERISA. *See* 29 U.S.C. § 1002(5) (defining "employer" for ERISA purposes as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan"). This argument suggests that footnote 14 distinguishes *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), as turning on the presence in *Shaw* of "companies *subject to ERISA regulation.*" *Shaw*, 463 U.S. at 96 n. 14, 103 S.Ct. at 2899 n. 14. The Council further argues that because Hydrostorage is not an "employer" under ERISA, it cannot state a claim under 29 U.S.C. § 1132(a), which authorizes various persons to bring civil actions for ERISA violations. 29 U.S.C. § 1132(a) (authorizing actions to enforce ERISA by Secretary of Labor, and by participants, fiduciaries, or beneficiaries of ERISA trusts); *see also Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 & n. 6 (9th Cir.1982) (employers may also sue under 29 U.S.C. § 1132). Nor, according to the Council, is Hydrostorage either a "participant" or a "beneficiary" of an ERISA fund, as those terms are defined by statute. 29 U.S.C. § 1002(2)(B)(7) & (8). Thus, argues the Council, the district court lacked subject matter jurisdiction.

The Council misconceives the nature of this action and the meaning of the *Shaw* footnote. This is not an action brought directly under 29 U.S.C. § 1132(a). It is an action for injunctive and declaratory relief from state regulation based on federal question jurisdiction, 28 U.S.C. § 1331. *See New Orleans Public Service, Inc. v. New Orleans*, 782 F.2d 1236, 1240-41 (5th Cir.), (*New Orleans*), *amended*, 798 F.2d 858 (1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987). As the Court in *Shaw* asserted, "[a] plaintiff who seeks *injunctive* relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Con-

stitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. at 96 n. 14, 103 S.Ct. at 2899 n. 14 (emphasis added); *see also Lawrence County v Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 259 n. 6, 105 S.Ct. 695, 697 n. 6, 83 L.Ed.2d 635 (1985). This rule has been applied in numerous cases in this and other circuits. *See, e.g., Martori Brothers Distributors v. James-Massengale*, 781 F.2d 1349, 1353 (9th Cir.) (*Martori*), *amended*, 791 F.2d 799, *cert. denied*, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 385 (1986); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1288 (9th Cir.1983), *cert. denied*, 466 U.S. 936, 104 S.Ct. 1908, 80 L.Ed.2d 457 (1984); *Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 236-37 (1st Cir.1987); *New Orleans*, 782 F.2d at 1240-41; *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024, 1028 (4th Cir.1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984); *Pacific Merchant Shipping Association v. Aubry*, 709 F.Supp. 1516, 1521-22 (C.D. Cal.1989). Here, Hydrostorage is seeking, among other remedies, injunctive relief from regulation, arguing that the underlying state statutes are preempted under the supremacy clause by ERISA. In a case such as this, the supremacy clause and the federal statute provide subject matter jurisdiction under 28 U.S.C. § 1331. We conclude that the district court had jurisdiction under 28 U.S.C. § 1331.

III

The Council next argues that the district court should have abstained from exercising jurisdiction under either the *Pullman* or *Younger* abstention doctrines. The Council argues that this court "has the authority to apply the doctrine of abstention regardless of whether the issue was raised before the District Court or even before this Court." We agree. *See Bellotti v. Baird*, 428 U.S. 132, 143-44 n. 10, 96 S.Ct. 2857, 2864-65 n. 10, 49 L.Ed.2d 844

(1976) (abstention may be properly raised *sua sponte*); *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir. 1982) (though neither party briefed issue of *Pullman* abstention, panel raised it at oral argument and disposed of case on this ground). But we are not required to do so since it does not implicate our subject matter jurisdiction. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S.Ct. 1898, 1903-04, 52 L.Ed.2d 513 (1977); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 6 (5th Cir.1978) (en banc) ("Appellant did not raise the question of *Younger* abstention [on appeal], and that issue, being nonjurisdictional, is thus not before this court."), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (per curiam); *Schachter v. Whalen*, 581 F.2d 35, 36 n. 1 (2d Cir.1978) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to the jurisdiction of the federal district court as such to hear the case.").

Although the district court abstained under *Younger* pending completion of the state administrative proceedings, it heard and decided Hydrostorage's motion for summary judgment after the Council's decision was rendered. None of the appellants argued in the district court for abstention under *Younger* or *Pullman* after the Council decided Hydrostorage's administrative appeal. Under these circumstances, when the district court did not consider the issue, we decline to address abstention on appeal. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115-16 n. 19 (9th Cir.1987) (since party did not raise abstention issues in trial court, appellate court need not consider them on appeal).

IV

Boilermakers next argue that the district court erred in concluding that ERISA preempts the administrative order in this case. We review a summary judgment de novo. *Rutledge v. Arizona Board of Regents*, 859 F.2d

732, 734 (9th Cir.1988); *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305, 1309 (9th Cir.1987) (summary judgment based on ERISA-preemption reviewed de novo), *cert. denied*, —— U.S. ——, 108 S.Ct. 1122, 99 L.Ed.2d 282 (1988). Because there are no contested issues of fact, we need decide only whether the substantive law was applied correctly. *Martori*, 781 F.2d at 1351.

ERISA is a "comprehensive remedial statute 'designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans.'" *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1217 (9th Cir.), (*Jones*), *aff'd*, —— U.S. ——, 109 S.Ct. 210, 102 L.Ed.2d 202 (1988), *quoting Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir.1985). The statute "sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits." *Massachusetts v. Morash*, —— U.S. ——, 109 S.Ct. 1668, 1677-72, 104 L.Ed.2d 98 (1989) (*Morash*).

ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both. 29 U.S.C. § 1002(3); *Morash*, 109 S.Ct. at 1672. The statute defines "employee welfare benefit plan" as follows:

> any *plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer only by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance *or otherwise*, (A)

> medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . .

29 U.S.C. § 1002(1) (emphasis added).

ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . ." 29 U.S.C. § 1144(a) (emphasis added). "State laws" are defined as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). A "state" is defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2).

Several exceptions exist to ERISA's broad preemption clause. Only one such exception is relevant to this case, however: ERISA's so-called "savings clause." Section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

Applying these statutory provisions, the district court held that the Council's order was preempted by ERISA. 685 F.Supp. at 723. The district court first reasoned that "the Apprenticeship Program under the Boilermakers collective bargaining agreement" constituted an ERISA employee welfare benefit plan. *Id.* at 721: Next, the court determined that administrative order against Hydrostor-

age was preempted under section 514(a), 29 U.S.C. § 1144(a). *Id.* Finally, the court held that the administrative order was not saved by section 514(d), ERISA's savings clause. *Id.* at 723.

On appeal, Boilermakers have challenged each of these steps in the district court's analysis. We address them in turn.

A.

We first consider whether this case involves an "employee benefit plan," a necessary predicate for the applicability of ERISA. The parties do not contend that any "employee pension benefit plan" is involved here. Instead, they properly focus on whether there is an "employee welfare benefit plan." To answer this question, we must consider whether this case involves a "*plan, fund, or program* . . . established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants . . . *apprenticeship or other training programs.*" 29 U.S.C. § 1002(1) (emphasis added).

ERISA does not define the terms "plan," "fund," "program," or "apprenticeship training program." *See Morash*, 109 S.Ct. at 1672. Regulations issued by the Secretary of Labor under authority delegated by statute similarly fail to define these terms. *See* 29 C.F.R. § 2510.3-1 (1988); 29 U.S.C. § 1135. Moreover, of the very few reported decisions involving ERISA and apprenticeship funds or programs, none defines or analyzes the term "apprenticeship training program." In the absence of such guidance, we "must give effect to [the statute's] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97, 103 S.Ct. at 2900; *see also id.* at 97 n. 16, 103 S.Ct. at 2900 n. 16 (quoting *Black's Law Dictionary* definitions in determining the meaning of phrase "relates to" in ERISA's preemption clause).

The district court applied the plain meaning of the statute. In explaining why this case involved an employee welfare benefit plan, the district court wrote:

> There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of [29 U.S.C. § 102(1)'s] definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training. That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as [the Division] argues, in no way takes the Apprenticeship Program out of the statutory definition.

685 F.Supp. at 721 (footnote omitted). It is unclear to us precisely what the district court meant by the "Apprenticeship Program." This term conceivably could encompass the apprenticeship trust fund, the Standards, and even the Committee.

A "fund" has been defined as "[a]n asset or group of assets set aside for a specific purpose," or "[a] sum of money or other liquid assets set apart for a specific purpose, or available for the payment of debts or claims." *Black's Law Dictionary* 606 (5th ed. 1979). A "plan" has been described as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. [A] [m]ethod of putting into effect an intention or proposal." *Id.* at 1036 (citation omitted). Although *Black's Law Dictionary* does not supply a definition of "program," another prominent dictionary defines a program as a "plan of procedure," "schedule or system under which action may be taken toward a desired goal," or "proposed project or scheme." *Webster's Third New International Dictionary* 1812 (1971).

We recently held that an apprenticeship training fund is an employee welfare benefit plan under ERISA. *Jones*, 846 F.2d at 1217 ("Since the [local apprenticeship fund]

is established to provide 'apprenticeship or other training programs,' it is an 'employee welfare benefit plan' within the meaning of ERISA."). The parties agree that the Boilermakers' apprenticeship trust fund (Fund) qualifies as an ERISA employee benefit plan.

A more difficult question is whether the Standards constitute an "employee welfare benefit plan," i.e., a "plan" or "program" which was "established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1). We conclude that the Standards satisfy this definition. The Standards consist of a detailed, 16-page document which specifies the duties and procedure of the Committee, the minimum qualifications of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, and the hours and wages of apprentices. The Standards also provide for supplemental instruction as well as period examination of apprentices. The Standards clearly embody "a method of design or action, procedure, or arrangement for accomplishment of a particular . . . object," in this case the training of apprentices. *Black's Law Dictionary* 1036 (5th ed. 1979). In addition, there is no question that the Standards were established "for the purpose of providing for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1). The Standards's stated purpose is "the training of Boilermakers, skilled in all phases of the erection and repair industry, who will be a credit to the industry." Finally, the Standards were established by the Committee, an entity created by the collective bargaining agreement and composed of equal numbers of representatives of labor and management. As such, the Committee qualifies as "an employer or . . . employee organization, or . . . both." *Id.*

The Standards are an integral part of a larger "program" established for the purpose of providing "appren-

ticeship . . . training." *Id.* Thus, both the Fund and the Standards fall within the definition of an "employee welfare benefit plan" under ERISA.

We need not decide whether the Committee itself, whose functions include the formulation and administration of the Standards, is also part of the employee welfare benefit plan. The Division strenuously argues that while the Fund is an ERISA plan, the Committee is not. The resolution of this issue has no bearing on our decision. Since the Standards and Fund constitute an ERISA plan, this case clearly falls within the coverage of ERISA.

The Division argues, however, that we should eschew a literal interpretation of ERISA's definition and defer instead to Congress's broader purpose behind the statute. While the Supreme Court has recognized that various provisions in ERISA are " 'perhaps . . . not a model of legislative drafting,' " *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed2d 39 (1987) (*Pilot Life*) (referring to preemption and insurance savings clauses), *quoting Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728 (1985) (*Metropolitan Life*), and that in particular the term "employee benefit plan" is "defined only tautologically in the statute," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987) (*Coyne*), it also frequently has looked to the plain meaning of statutory language. *See id.* at 7-8, 107 S.Ct. at 2215-2216; *Metropolitan Life*, 471 U.S. at 740, 105 S.Ct. at 2389; *Shaw*, 463 U.S. at 97 & n. 16, 103 S.Ct. at 2900 & n. 16. In addition, the Division acknowledges that ERISA's legislative history fails to address what "plan, fund or program" means in the context of apprenticeship training programs. Perhaps the reason for this is that Congress, in enacting ERISA, focused on the regulation of employee *pension* benefit plans and spent little time considering employee *welfare* benefit plans. *See* Brummond, *Federal*

Preemption of State Insurance Regulation Under ERISA, 62 Iowa L.Rev. 57, 113-22 (1976).

The Division's argument is essentially one for statutory revision and is properly directed to the Legislative Branch. *See Shaw*, 463 U.S. at 106, 103 S.Ct. at 2904 ("To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of congressional choice and should be addressed by congressional action."). The statute is clear on its face. Our commission is to follow its precepts. We are not allowed to amend the statute though the Division's suggested interpretation. We conclude that the Standards and Fund are an ERISA plan.

B.

We must next consider whether the Council's order falls under ERISA's preemption clause, which preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a). In recent years, the Supreme Court has examined the scope of ERISA preemption on numerous occasions. *See, e.g., Morash*, 109 S.Ct. 1668; *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (*Mackey*); *Coyne*, 482 U.S. 1, 107 S.Ct. 2211; *Pilot Life*, 481 U.S. 41, 107 S.Ct. 1549; *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Metropolitan Life*, 471 U.S. 724; 105 S.Ct. 2380; *Shaw*, 463 U.S. 85, 103 S.Ct. 2890; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (*Alessi*). The Court has stated that "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life*, 481 U.S. at 45-46, 107 S.Ct. at 1551-52, *quoting Alessi*, 451 U.S. at 523, 101 S.Ct. at 1906.

There is no question that the Council's administrative order against Hydrostorage constitutes a "state law"

within the meaning of ERISA. *See* 29 U.S.C. § 1144 (c) (1) (defining "state laws" as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State"). The Council's order has the effect of law in California. Furthermore, the Council comes within ERISA's definition of a "state" because it is included within "a State, and political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employeee benefit plans covered by this subchapter." 29 U.S.C. § 1144 (c) (2).

More difficult is the issue of whether the administrative order "relates to" an ERISA employee benefit plan. We have required that a state law both "relate to," 29 U.S.C. § 1144 (a), and "purport[] to regulate, directly or indirectly," 29 U.S.C. § 1144 (c), an employee welfare benefit plan in order for it to be preempted. *Jones*, 846 F.2d at 1218; *Martori*, 781 F.2d at 1356. "'A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Shaw*, 463 U.S. at 96-97, 103 S.Ct. at 2899-900. A law purports to regulate a plan if it attempts to reach in one way or another the terms and conditions of employee benefit plans. *Jones*, 846 F.2d at 1218; *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984).

Boilermakers argue that section 1777.5 does not "relate to" or "purport to regulate" an ERISA plan. The district court reasoned that the Council's order "relates to" an ERISA plan because it "compel[s] Hydrostorage to participate in and contribute to the Boilermakers Apprenticeship Program" and because section 1777.5, upon which the order was based, "establishes the manner in which contractors must participate in the Apprenticeship Program and fund its costs." 685 F.Supp. at 721. As for our additional requirement that the challenged state law "purport[] to regulate, directly or indirectly" an[] ERISA plan, the district court concluded that "there

can be no question but that § 1777.5 regulates apprenticeship program[s]." *Id.* at 721 n. 6. Although we disagree with some of the district court's reasoning, we agree with its conclusion that the administrative order against Hydrostorage falls under ERISA's preemption clause.

First, the order clearly "relates to" the Standards, which are part of an ERISA plan. Hydrostorage was sanctioned for failing to apply to the Committee for permission to train apprentices on the Lathrop project. The very purpose of requiring Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan. Hydrostorage would have been required to sign a DAS-7 form entitled "Agreement to Train Apprentices." By signing a DAS-7 form, Hydrostorage would agree "to train apprentices in the designated occupation in accordance with the *apprenticeship standards* and apprenticeship agreement and to comply with the provisions thereof." The "apprenticeship standards" in this case are the Standards, an ERISA plan. Thus, the order undoubtedly "relates to" an ERISA plan in the sense that the order has a "connection with or reference to" the Standards.

Second, we conclude that the administrative order purports to regulate, indirectly or directly," an ERISA plan. Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan. *See Metropolitan Life*, 471 U.S. at 739, 105 S.Ct. at 2388 (Massachusetts law requiring ERISA plans to provide minimum coverage for mental health care expenses "bears indirectly but substantially" on plans since "it requires them to purchase the mental-health benefits specified in the statute"). The order is designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order was based, California Labor Code § 1777.5. Section 1777.5 is aimed at enforcing the terms of an

ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The underlying statute is therefore one which is specifically designed to affect employee benefit plans. *See Mackey*, 108 S.Ct. at 2185 ("[W]e have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under § 514(a).") (citations and internal quotations omitted). We therefore conclude that the administrative order falls within ERISA's preemption clause.

The Committee argues, however, that section 1777.5 does not "purport to regulate" because it "applies only when the state is purchasing services in the marketplace, and simply expresses a decision as to the terms upon which the state chooses to do business." In essence, the Committee argues that California is acting as a "marketplace participant," not a regulator. The Committee relies on a series of dormant commerce clause cases which discuss the market participant theory.

There are two reasons why we reject the Committee's "market participant" argument. First, as the Supreme Court observed in rejecting a similar argument in a case involving NLRA preemption, *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289, 106 S.Ct. at 1062; *see also id* at 290, 106 S.Ct. at 1063 ("What the Commerce Clause would permit States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place."). Second, California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors

who work on public contracts. The Division, part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."

C.

Finally, Boilermakers argue that section 1777.5 is saved from preemption by section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), which provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." Boilermakers argue that the administrative order is saved in light of the Fitzgerald Act, 29 U.S.C. § 50 et seq., which provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . .

29 U.S.C. § 50. These apprenticeship standards are set forth at 29 C.F.R. § 29.1-19.13 (1988). The regulations provide "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor." *Siuslaw Concrete Construction Co. v. Washington, Department of Transportation*, 784 F.2d 952, 956 (9th Cir.1986).

Boilermakers argue that section 514(d), which saves "any rule or regulation issued under any [law of the United States]," saves section 1777.5 from preemption be-

cause section 1777.5 promotes and encourages the spread of approved apprenticeship programs established under the auspices of the Fitzgerald Act and the regulations of the Secretary of Labor.

The district judge addressed Boilermakers' argument at length, *see* 685 F.Supp. at 721-23, concluding that "[b]y no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law." *Id.* at 722. The court reasoned:

> The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. § 50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. § 29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Id. We adopt the district court's reasoning.

As they did in the district court, Boilermakers seek to invoke the Supreme Court's decision in *Shaw* to support their claim that section 514(d) saves the administrative order and California Labor Code § 1777.5 from preemption. In *Shaw*, appellants argued that section 514(d)

saved a New York human rights law which forbid discrimination in employee benefit plans on the basis of pregnancy. 463 U.S. at 100-06, 103 S.Ct. at 2901-04. Appellants in *Shaw* argued that preemption of the New York statute would "impair" or "modify" Title VII of the federal Civil Rights Act of 1964. *Id.* at 100-01, 103 S.Ct. 2901-02. The Court accepted this argument, but only insofar as the New York law prohibited employment practices that were also unlawful under Title VII. *See also id.* at 103-04, 103 S.Ct. at 2903-04 (New York statute not saved to the extent that it "prohibit[s] conduct that federal law permit[s]" since Title VII "in no way depends on such extensions for its enforcement"). The Court's holding in *Shaw* that parts of the state law were saved rested on (1) the presence in Title VII of a clause explicitly preserving nonconflicting state laws, and (2) Title VII's requirement that a claimant, before filing a charge with the federal Equal Employment Opportunity Commission (EEOC), first pursue available state administrative remedies. *Id.* at 101-02, 103 S.Ct. at 2902-03. The Court concluded:

> Given the importance of state fair employment laws to the federal enforcement scheme, preemption of the Human Rights Law would impair Title VII *to the extent that the Human Rights Law provides a means of enforcing Title VII's commands.* Before the enactment of ERISA, an employee claiming discrimination in connection with a benefit plan would have had his complaint referred to the New York State Division of Human Rights. If ERISA were interpreted to preempt the Human Right Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of *encouraging joint state/federal enforcement* of Title VII; an employee's only remedies for discrimination

> prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of *the enforcement scheme* contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.

Id. at 102, 103 S.Ct. 2902 (emphasis added) (footnote omitted). The Court's conclusion clearly rested upon the fact that the New York law functioned as an enforcement mechanism for Title VII. That is simply not the case here. The Fitzgerald Act does not articulate a "goal of encouraging joint state/federal enforcement." Nor does the Fitzgerald Act contain any clause which preserves state laws. *See also* 685 F.Supp. at 722 (rejecting attempt to rely on *Shaw*).

We reject Boilermakers' argument that the Fitzgerald Act embodies a project in "cooperative federalism" which will be "impaired" or "modified" within the meaning of section 514(d) if the administrative order against Hydrostorage were preempted by ERISA. This argument relies on an overbroad reading of *Shaw* and on dicta in an out-of-circuit decision. *See Rebaldo v. Cuomo*, 749 F.2d 133, 139-40 (2d Cir.1984) (Van Graafeiland, Jr., "writing only for himself and not his colleagues" on issue of whether state law which panel concluded was not preempted under section 514(a) would also be saved under section 514(d), if it had been preempted). *cert. denied*, 472 U.S. 1008, 105 S. Ct. 2702, 86 L.Ed.2d 718 (1985). As the Court instructed in *Shaw*, ERISA's structure and legislative history "caution against applying [section 514(d)] too expansively." 463 U.S. at 104, 103 S.Ct. at 2903. "While § 514(d) may operate to exempt provisions of state law, upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive preemption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause." *Id.* We conclude that the Council's order is not saved from preemption by section 514(d) of ERISA. We also hold that as applied

in the Council's order, section 1777.5 is not saved from ERISA preemption. However, like the district court, we do not address whether section 1777.5 in its entirety is preempted by ERISA. 685 F.Supp. at 723.

Because we affirm the district court's judgment on the grounds that the Council's order is preempted by ERISA, we need not reach the issue of NLRA preemption.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C-87-2401-WWS, C-88-0804-WWS

HYDROSTORAGE, INC., A Tennessee corporation,
Plaintiff,

v.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; *et al.*,
Defendants.

HYDROSTORAGE, INC.,
Petitioner,

v.

DIVISION OF APPRENTICESHIP STANDARDS; GAIL JESSWEIN in his capacity as Chief Of The Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,
Respondents.

May 4, 1988

Karen E. Ford, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for Hydrostorage, Inc.

John Rea, Dept. of Industrial Relations, San Francisco, Cal., for State defendants.

Julian O. Standen, Deputy Atty. Gen., San Francisco, Cal., for Susan Hamilton & R.T. Rinaldi.

Dalvin J. Abe, Deputy Atty. Gen., San Francisco, Cal., for California Apprenticeship Council.

David A. Rosenfeld, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Cal., for Boilermaker Joint Apprenticeship Committee.

MEMORANDUM OF OPINION AND ORDER

SCHWARZER, District Judge.

In these consolidated actions, Hydrostorage, Inc., seeks injunctive and other relief against the California Division of Apprenticeship Standards ("DAS"), the Northern California Boilermakers Local Joint Apprenticeship Committee ("JAC"), and other defendants to prevent the enforcement against Hydrostorage of an order of DAS issued pursuant to California Labor Code § 1777.5.

Hydrostorage initially sought to enjoin the DAS hearing on an administrative complaint filed against it by JAC for noncompliance with § 1777.5. The Court declined relief without prejudice, pending the issuance by DAS of a final order. A proposed order was issued on September 25, 1987, by a hearing officer. With minor modifications not relevant to the disposition of this matter,[1] the DAS Appeals Board affirmed the order on January 28, 1988, and the California Apprenticeship Council ("CAC") concurred. The order became effective March 1, 1988. Hydrostorage has exhausted its administrative remedies.

In the determination and order issued by DAS upon the complaint, it found that Hydrostorage was required to apply to the JAC for approval to train apprentices and to pay training fund contributions to the appropriate fund or CAC. The order imposes a civil penalty on Hydrostor-

[1] In substance, the Appeals Board eliminated one of the findings of willfulness.

age and denies it the right to seek any public works contract in California for a period of one year.

On March 3, 1988, Hydrostorage filed a new complaint for injunctive and other relief against enforcement of the order. It also filed an amended complaint in its original action seeking similar relief. Both plaintiff and defendants have moved for summary judgment. Counsel have had an opportunity to argue and comment on the Court's proposed ruling and their voluminous submissions have been considered. No material facts are in dispute and the matter is ripe for decision.

Jurisdiction

Hydrostorage seeks relief against enforcement of an order by DAS under § 1777.5 alleging preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151. The complaint presents a federal question of which this Court has jurisdiction under 28 U.S.C. § 1331. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

The Statutory Scheme and the Material Facts

Labor Code § 1777.5 imposes certain requirements on every contractor performing contracts awarded by the State of California or its political subdivisions.[2] In substance, it requires that the contractor:

---

[2] Section 1777.5 states in relevant part:

> When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment

1. Obtain a certificate from a joint apprenticeship committee approving the contractor under the

---

and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship commitee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the areas of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ration of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section.

* * * *

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of

apprenticeship standards for employment and training of apprentices in the applicable craft;

2. Employ not less than one apprentice for each five journeymen employed in that craft on the public work; and

3. Contribute to an appropriate fund to administer and conduct the apprenticeship program in that craft.[3]

Under § 1777.7, willful noncompliance with § 1777.5 renders a contractor ineligible to bid on any public works project for one year and subjects him to a civil penalty.

Hydrostorage is a contractor engaged in the construction of water storage facilities. A large part of its work consists of public works contracts. The project giving rise to the instant controversy was a contract to construct water storage tanks for the Lathrop Water District. The work performed fell within the jurisdiction of the International Brotherhood of Boilermakers, Iron

---

the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall apply a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

[3] Section 1777.5 provides for certain exemptions and alternatives not relevant here.

Shipbuilders, Blacksmiths, Forgers and Helpers ("Boile
makers"), a labor organization within the meaning
the NLRA, 29 U.S.C. § 152(5). It is not disputed th
§ 1777.5 applies to the project, that Hydrostorage did n
seek a certificate of approval, and that it employed
apprentices on the project.

During the relevant period, a collective bargainir
agreement was in effect between the Boilermakers ar
numerous employers, but not Hydrostorage. The agre
ment provided for the establishment and operation of
Appenticeship Committee and an Apprenticeship Fur
and specified contributions to be paid by each employ
to the Fund.[4] On September 25, 1986, the JAC, create
pursuant to the collective bargaining agreement, filed t
complaint with DAS leading to these proceedings, cha
ing Hydrostorage with failure to apply for a certifica
of approval, failure to employ apprentices, and failu
to contribute to the appropriate fund.

ERISA Preemption

ERISA subjects to federal regulation "employee we
fare benefit plans." It "is a comprehensive statute d
signed to promote the interests of employees and the
beneficiaries in employee benefit plans." *Shaw*, 463 U.
at 90, 103 S.Ct. at 2896. The term "employee welfa
benefit plan" is defined to "mean any plan, fund, or pr
gram . . . maintained by an employer or by an employ
organization, or by both, to the extent that . . . [it] w
established or is maintained for the purpose of providir

---

[4] Detailed provisions for the operation of the apprenticeship p
gram are contained in a document entitled Boilermaker Standar
of Apprenticeship for Field Construction and Repair of Eig
Western States Area (as revised March 27, 1974). Artile XX
provides that "any expenses incurred for the administration of t
training program . . . shall be borne by the fund that has be
established," that being the fund provided for in the collective b
gaining agreement.

for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1).

There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of this definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training.[5] That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as DAS argues, in no way takes the Apprenticeship Program out of the statutory definition.

Section 514(a) of ERISA states that the act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "State law" is defined to consist of "all laws, decisions, rules, regulations or other State action having the effect of law." 29 U.S.C. § 1144(c)(1). "State" is defined as including "a State . . . or any [state] agency . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2). Under these provisions, preemption depends on "whether the [state law] 'relate[s] to' employee benefit plans within the meaning of § 514(a)." *Shaw*, 463 U.S. at 96, 103 S.Ct. at 2899.[6]

---

[5] Counsel for the JAC conceded as much at the hearing (Tr. 8, lines 11-17).

[6] In *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.1986), the court held that for a state law to be preempted it must "both 'relate[]' to an ERISA plan and 'purport[] to regulate, directly or indirectly' ERISA plans." The Supreme Court did not articulate such a two-pronged test in *Shaw* or elsewhere. It is apparently derived from two decisions of the Second Circuit. *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub. nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220, 103 S.Ct. 3564 77

"Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw*, 463 U.S. at 96, 103 S.Ct. at 2900. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 97, 103 S.Ct. at 2900. The DAS's determination and order issued under Section 1777.5 compel Hydrostorage to participate in and contribute to the Boilermakers Apprenticeship Program, an ERISA benefit plan. Thus they relate to an ERISA plan. *See generally Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D.Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980).

Moreover, the statute establishes the manner in which contractors must participate in the Apprenticeship Program and fund its costs. Thus, the statute regulates matters that are regulated by ERISA. *See, e.g.*, 29 U.S.C. §§ 1082, 1102-1104; *Martori Bros. Distributors*, 781 F.2d at 1357-58; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985).

L.Ed.2d 1405 (1983); *Rebaldo v. Cuomo*, 149 F.2d 133, 137 n. 1 (2d Cir.1984). *See also Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984).

A close reading of § 514 casts doubt on this interpretation. Section 514 preempts "any and all State laws insofar as they may . . . relate to any employee benefit plan." Section 514(c)(1) defines "state law" as "includ[ing] all laws, decisions, rules, regulations, or other State action having the effect of law." The reference to regulation of plans appears only in § 514(c)(2) defining "state" to include "a State, any political subdivision there, or any agancy or instrumentality of either which purports to regulate . . . the terms and conditions of employee benefit plans." Had Congress intended to limit preemption to those state laws that "regulate," it would presumably have included in subsection (c)(1) the words found in subsection (c)(2).

In any event, there can be no question but that § 1777.5 regulates apprenticeship program.

ERISA therefore preempts the DAS determination and order issued under § 1777.5 unless it is saved by § 514(d) which states

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.

Defendants argue that § 1777.5 was adopted pursuant to the Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, and the regulations issued by the Secretary of Labor under the Act, 29 C.F.R. Part 29. Because federal law encourages the states to promote and regulate apprenticeship programs, they argue, "state law becomes a way to put into effect federal law. Thus, to interfere with that state law would necessarily 'alter . . ., modify . . ., impair . . . any law of the United States.'" JAC Memo at 6. Their argument rests on *Shaw* in which the Supreme Court applied § 514(d) to save from preemption so much of the New York Human Rights Law as prohibits discriminatory employment practices *that are also prohibited* by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

In *Shaw*, the Court had before it a state antidiscrimination law which, under the express provisions of Title VII, provided the enforcement mechanism for federal antidiscrimination law. As the Court put it,

> Title VII requires recourse to available state administrative remedies. When an employment practice prohibited by Title VII is alleged to have occurred in a State . . . which prohibits the practice and has established an agency to enforce the prohibition, the [EEOC] refers the charges to the state agency. The EEOC may not actively process the charges "before the expiration of sixty days after proceedings have been commenced under the State . . . law. . . ."

463 U.S. at 101-02, 103 S.Ct. at 2902. The Court concluded that "Given the importance of state fair employ-

ment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent the Human Rights Law provides a means for enforcing Title VII's commands." *Id.* at 102, 103 S.Ct. at 2902. However insofar as state law imposed obligations beyond those imposed by federal law, ERISA preemption would not impair Title VII and therefore § 514(d) will not preclude preemption.

By no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law. The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. § 50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. § 29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Defendants also argue that footnote 24 of *Shaw* saves the DAS order on the theory that preemption would impair operation of the Fitzgerald Act insofar as the Act encourages states to give broader protection to apprentices than federal law may require. To begin with, the Fitzgerald Act contains no saving clause for state laws. *Shaw* concerned Title VII, which does contain such a clause. *See* Title VII, § 708, 42 U.S.C. § 2000e-7. More-

over, even with respect to Title VII, the Court said that it does no more than "simply [leave state antidiscrimination laws] where they were before the enactment of Title VII." *Shaw*, 463 U.S. at 103 n.24, 103 S.Ct. at 2903 n.24. The same is true here.

Finally, the lack of merit of defendants' argument is confirmed by comparing the Fitzgerald Act and the implementing regulations with ERISA, which shows that the former do not deal with the basic subject matter of ERISA, i.e., plan management and distribution of benefits. Specifically, the regulations are silent with respect to creation of or contributions to apprenticeship funds. Thus, there is no apparent conflict between regulations establishing standards for the welfare of apprentices and ERISA regulation of the administration of employee benefit plans which would invoke § 514(d). Presumably this was Congress's view when it included apprenticeship programs in ERISA without evident concern about conflict with the Fitzgerald Act.

Accordingly it must be concluded that § 514(d) does not save the order issued under § 1777.5 from ERISA preemption.[7]

It may, at first blush, seem odd, and perhaps farfetched, that ERISA should be held to preempt state law provisions and orders requiring public works contractors to participate in apprenticeship programs. However, as the Court stated in *Shaw*, "To give § 514(d) the broad construction advocated by [defendants] would defeat the intent of Congress to provide comprehensive pre-emption of state law." *Id.* at 106, 103 S.Ct. at 2904-05. Moreover, on examination, the program the state imposes on contractors falls squarely within the purposes of ERISA as recently articulated by the Supreme Court:

---

[7] In view of this conclusion, it is unnecessary to consider whether § 1777.5 and § 1777.7 are also preempted as being enforcement schemes. *See Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

> These statements reflect recognition of the administrative realities of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.
>
> We have not hestitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements.

Fort Halifax Packing Co., Inc. v. Coyne, —— U.S. ——, 107 S.Ct. 2211, 2216, 96 L.Ed2d 1 (1987).[8]

Defendants concede that the Boilermakers Apprenticeship Fund is subject to ERISA as well as the Labor-Management Relations Act, 29 U.S.C. § 186(c)(6), but argue that the JAC is a separate entity. The argument, of course, misconceives the issue which is that state law

---

[8] The Boilermakers Fund is identified in the collective bargaining agreement as the Nine Western States Area Apprenticeship Fund. Thus contributions are obviously made by employers in different states.

requires public works contractors to participate in an ERISA-type benefit program and contribute to an ERISA fund.

The holding that the DAS determination and order under § 1777.5 are preempted by ERISA should not be taken as denigrating the desirability of apprenticeship programs, invalidating the State's policy to promote such programs, and denying state authority to regulate the conditions of employment of apprentices. The Court recognizes that federal policy favors "the formulation of programs of apprenticeship," as reflected in the Fitzgerald Act, 29 U.S.C. § 50, *et seq.*

The Court has not been asked to strike down § 1777.5 nor does it do so by this order which holds only that as applied in this case it is preempted by ERISA. In light of what has been said here about the Fitzgerald Act and the implementing regulations, the State may be able to adopt standards to safeguard the welfare of apprentices that do not run afoul of ERISA. In any event, that is not an issue that need be decided here.

NLRA Preemption

It is not disputed that in order to participate in the apprenticeship program mandate by the DAS order, Hydrostorage would have to execute an Agreement to Train Apprentices. Under the terms of that Agreement, Hydrostorage would become bound by the Apprenticeship Standards and Apprenticeship Agreement which are a part of the Boilermakers collective bargaining agreement as Appendix D.

Under Appendix D, the employer agrees, among other thing, to be bound by the agreement and declaration of trust establishing the Boilermakers Area Apprenticeship Funds and any amendments, and to make contributions to the Funds as required by the JAC. The collective bargaining agreement itself contains provisions respecting

the employment of apprentices, including rates of pay and the minimum ratio of apprentices to journeymen. By signing the Agreement to Train Apprentices, the employer apparently becomes bound by these provisions.

Thus, by requiring Hyrostorage to execute the Boilermakers Agreement to Train Apprentices, the order would make it an involuntary party to Appendix D and certain other provisions of the collective bargaining agreement, although it had no part in the negotiation of that agreement and has not accepted it. It would, moreover, be subject not only to those agreements but also to any future changes that may be negotiated by the union and the employer parties.[9]

The Supreme Court has only recently summarized the controlling principles:

> Last Term, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 [105 S.Ct. 2380, 85 L.Ed.2d 728] (1985), we again noted: "The Court has articulated two distinct NLRA preemption principles." *Id.* at 748 [105 S.Ct. at 2394]. See also *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-499 [103 S.Ct. 3172, 3176-3177, 77 L.Ed.2d 798] (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon*, 350 U.S. 236 [76 S.Ct. 773, 3 L.Ed.2d 775] (1959), prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of*

---

[9] Section 1777.5 provides that "where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council." None of the parties contends that this exception applies here. But even if it did and if it gave Hydrostorage an option to make its contribution to the CAC, Hydrostorage would still be required under § 1777.5 "to apply to the joint apprenticeship committee administering the apprenticeship standards of the craft," in this case the Boilermakers. And that application, as has been seen, has the effect of making it an involuntary party to substantial portions of the collective bargaining agreement.

Industry v. Gould Inc., ante [475 U.S.] at 286 [106 S.Ct. 1057, 89 L.Ed.2d 223 (1986)]. The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by NLRA. *Ante*, at 289 [106 S.Ct. at 1062]. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 748, and n. 26 [105 S.Ct. at 2394 and n. 26]. . . . Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " *Machinists*, 427 U.S., at 140 [96 S.Ct. at 2553], quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 [92 S.Ct. 373, 377, 30 L.Ed.2d 328] (1971). The Court recognized in *Machinists* that " 'Congress has been rather specific when it has come to outlaw particular economic weapons,' " 427 U.S., at 143 [96 S.Ct. at 2555], quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 [80 S.Ct. 419, 421, 4 L.Ed.2d 454] (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' " *Machinists*, 427 U.S. at 146 [96 S.Ct. at 2556], quoting *Teamsters v. Morton*, 377 U.S. 252, 258-259 [85 S.Ct. 1253, 1257-1258, 12 L.Ed.2d 280] (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U.S., at 147 [96 S.Ct. at 2556], unless such restrictions presumably were contemplated by Congress.

Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613-15, 106 S.Ct. 1395, 1398-99, 89 L.Ed.2d 616 (1986).

By requiring Hydrostorage to become a party to certain provisions of the Boilermakers collective bargaining agreement, DAS is intruding into the area of collective bargaining from which Congress under the NLRA has excluded it. As the Court explained in *Golden State:* "The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616, 106 S.Ct. at 1399-1400. It is clear that a state cannot penalize an employer for not becoming a party to a collective bargaining agreement, in whole or in part, which it did not voluntarily negotiate.

Because application of the DAS determination and order would in this case have that effect, it is barred by the NLRA independent of ERISA preemption.

Conclusion

For the reasons stated, the motion of Hydrostorage for summary judgment is granted. Defendants are permanently enjoined from enforcing the DAS determination and order against Hydrostorage in connection with the Lathrop project.

Defendants' motions for summary judgment are denied.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

88-2798, 88-2800,
88-2802, 88-2966
88-2968, 88-2969

CV-87-2401-WWS
CV-88-804-WWS

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

vs.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capactity as Chief of the Division of Apprenticeship Standards, CALIFORNIA APPRENTICESHIP COUNCIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
(San Francisco)

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered 12-06-89.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-2798, 88-2800,
88-2802, 88-2966,
88-2968, 88-2969

D.C. Nos.
CV-87-2401-WWS
CV-88-804-WWS

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

vs.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capacity as Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

ORDER DENYING REHEARING

[Filed Mar. 16, 1990]

Before: WALLACE and NOONAN, Circuit Judges,
and BURNS,* District Judge.

---

* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E

1. The relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are as follows:

Section 3(1), 29 U.S.C. § 1002(1):

> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 514, 29 U.S.C. § 1144:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefits covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(a) of this title) or any rule or regulation issued under any such law.

* * * *

2. Section 1 of the National Apprenticeship Act of 1937 ("Fitzgerald Act"), 29 U.S.C. § 50, provides as follows:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of title 20. For

the purposes of this chapter the term "State" shall include the District of Columbia.

3. The relevant provisions of the California Labor Code are as follows:

§ 1777.5. **Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade; exemptions; contributions**

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as es-

tablished by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or commttees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involv-

ing less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis

the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

§ 1777.7. Noncompliance with § 1777.5 denial of right to bid on contracts; withholding civil penalty from progress payments; procedure

(a) In the event a contractor willfully fails to comply with the provisions of Section 1777.5, such contractor shall:

(1) Be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship; and

(2) Forfeit as a civil penalty in the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due such sum.

(b) Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council.

(c) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if such awarding body is an entity other than the state.

The interpretation and enforcement of Sections 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

§ 3070. Apprenticeship council; composition; appointment; terms; compensation; traveling expenses

There is in the Division of Apprenticeship Standards the California Apprenticeship Council, which shall be appointed by the Governor, composed of six representatives each from employer and employee organizations, respectively, geographically selected, and of two representatives of the general public. The Director of Industrial Relations, or his or her permanent and best qualified designee, and the Superintendent of Public Instruction, or his or her permanent and best qualified designee, and the Chancellor of the California Community Colleges, or his or her permanent and best qualified designee, shall also be members of the California Apprenticeship Council. The chairman shall be elected by vote of the California Apprenticeship Council. Beginning with appointments in 1985, three representative each of employers and employees, and one public representative shall serve until January 15, 1989. In 1987, three representatives each of the employers and employees, and one public representative shall serve until January 15, 1991. Any member whose term expires on January 15, 1986, shall continue to serve until January 15, 1987. Thereafter each member shall serve for a term of four years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his or her predecessor shall be appointed for the remainder of that term. Each member of the council shall receive the sum of fifty dollars ($50) for each day of actual attendance at meetings of the council, for each day of actual attendance at hearings by the council or a committee thereof pursuant to Section 3082, and for each day of actual attendance at meetings of other committees established by the council and approved by the Director of Industrial

Relations, together with his or her actual and necessary traveling expenses incurred in connection therewith.

§ 3071. Powers and duties of council

The California Apprenticeship Council shall meet at the call of the Director of Industrial Relations and shall aid him or her in formulating policies for the effective administration of this chapter.

Thereafter, the California Apprenticeship Council shall meet quarterly at a designated date and special meetings may be held at the call of the chairman. The California Apprenticeship Council shall issue rules and regulations which establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements, hereinafter in this chapter referred to as apprenticeship standards, which in no case shall be lower than those prescribed by this chapter; and shall issue rules and regulations governing equal opportunities in apprenticeship, affirmative action programs which include women and minorities in apprenticeship, and other on-the-job training, and criteria for selection procedures with a view particularly toward eliminating criteria not relevant to qualification for training employment or more stringent than is reasonably necessary. The California Apprenticeship Council shall make biennial reports through the Director of Industrial Relations of its activities and findings to the Legislature and to the public.

§ 3075. Apprenticeship program sponsors; approval of programs; joint sponsorship; composition of joint committees

An apprenticeship program sponsor may be a joint apprenticeship committee, unilateral management or labor apprenticeship committee, or an individual em-

ployer. Programs may be approved by the chief in any trade in the state or in a city or trade area, whenever the apprentice training needs justifies the establishment. Where a collective bargaining agreement exists, a program shall be jointly sponsored unless either party to the agreement waives its right to representation in writing. Joint apprenticeship committees shall be composed of an equal number of employer and employee representatives.

§ 3075.1. Apprenticeship as form of on-the-job training

It is the public policy of this state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost-effective in developing skills needed to perform public services. State and local public agencies shall make a diligent effort to establish apprenticeship programs for apprenticeable occupations in their respective work forces. In furtherance of this policy, public agencies shall take into consideration (a) the extent to which a continuous supply of trained personnel is readily available to public agencies to meet their skill requirements in the various occupations which are determined to be apprenticeable, and (b) the application of established programs in the private sector, where appropriate. Public sector apprenticeship programs should be fully compatible with affirmative action goals for the participation of minorities and women in apprenticeship programs.

§ 3076. Function of committees

The function of a joint apprenticeship committee, when specific written authority is delegated by the parent organizations represented, shall be to establish work processes, wage rates, working conditions for apprentices, the number of apprentices which

shall be employed in the trade under apprentice agreements, and aid in the adjustment of apprenticeship disputes in accordance with standards for apprenticeship set up by the California Apprenticeship Council. Disciplinary proceedings resulting from disputes shall be duly noticed to the involved individuals.

§ 3076.3. Program sponsors; duties

Program sponsors shall establish selection procedures which specify minimum requirements for formal education or equivalency, physical examination, if any, subject matter of written tests and oral interviews, and any other criteria pertinent to the selection process; shall specify the relative weights of all factors which determine selection to an apprenticeship program; shall submit in writing to the chief an official statement of each selection procedure including the filing date and location of the program sponsor; shall make a copy of the selection procedures available to each applicant; shall provide in writing to each applicant not selected an official explanation setting forth the reason or reasons for the nonselection, copies of which shall be retained as a public record in the files of the program sponsor for a period of five years; and shall implement affirmative action programs for minorities and women in accordance with the rules, regulations, and guidelines of the California Apprenticeship Council.

§ 3077. Apprentice and apprenticeship agreement defined; term of apprenticeship

The term "apprentice" as used in this chapter, means a person at least 16 years of age who has entered into a written agreement, in this chapter called an "apprentice agreement," with an employer or program sponsor. The term of apprenticeship for each apprenticeable occupation shall be approved by

the chief, and in no case shall provide for less than 2,000 hours of reasonably continuous employment for such person and for his or her participation in an approved program of training through employment and through education in related and supplemental subjects.

§ 3078. Apprenticeship agreement; required provisions

Every apprentice agreement entered into under this chapter shall directly, or by reference, contain:

(a) The names of the contracting parties.

(b) The date of birth of the apprentice.

(c) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

(d) A statement showing the number of hours to be spent by the apprentice in work and the learning objectives to be accomplished through related and supplemental instruction, except as otherwise provided under Section 3074. These exceptions shall be subject to the appeal procedures established in Sections 3081, 3083, and 3084. A minimum of 144 hours of related and supplemental instruction for each year of apprenticeship is recommended; however, related instruction may be expressed in terms of units or other objectives to be accomplished. In no case shall the combined weekly hours of work and required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age of the apprentice.

(e) A statement setting forth a schedule of the processes in the trade or industry divisions in which the apprentice is to be taught and the approximate time to be spent at each process.

(f) A statement of the graduated scale of wages to be paid the apprentice and whether the required schooltime shall be compensated.

(g) A statement providing for a period of probation of not more than 1,000 hours of employment and not more than 72 hours of related instruction, during which time the apprentice agreement may be terminated by the program sponsor at the request in writing of either party, and providing that after the probationary period the apprentice agreement may be terminated by the administrator by mutual agreement of all parties thereto, or canceled by the administrator for good and sufficient reason.

(h) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally, or which are not covered by collective-bargaining agreement, shall be submitted to the administrator for determination as provided for in Section 3081.

(i) A provision that an employer who is unable to fulfill his or her obligation under the apprentice agreement may, with approval of the administrator, transfer the contract to any other employer if the apprentice consents and the other employer agrees to assume the obligation of the apprentice agreement.

(j) Such additional terms and conditions as may be prescribed or approved by the California Apprenticeship Council, not inconsistent with the provisions of this chapter.

(k) A clause providing that there shall be no liability on the part of the other contracting party for an injury sustained by an apprentice engaged in schoolwork at a time when the employment of the apprentice has been temporarily or permanently terminated.

§ 3079. Approval and execution of agreement; agreement binding during majority of apprentice

Every apprentice agreement under this chapter shall be approved by the local joint apprenticeship committee or the parties to a collective bargaining agreement or, subject to review by the council, by the administrator where there is no collective bargaining agreement or joint committee, a copy of which shall be filed with the California Apprenticeship Council. Every apprentice agreement shall be signed by the employer, or his agent, or by a program sponsor, as provided in Section 3080, and by the apprentice, and if the apprentice is a minor, by the minor's parent or guardian. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his or her majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority.

4. The relevant Department of Labor regulations, 29 C.F.R. § 29.1 *et seq.*, are as follows:

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * *." Section 2 of

the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees * * *." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, polices and procedures cover the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

§ 29.3 Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and

the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR Part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a similar certificate or other written

indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

§ 29.4 Criteria for apprenticeable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical, technical skills and knowledge which require a minimum of 2,000 hours of on-the-job experience.

(d) It requires related instruction to supplement the on-the-job training.

§ 29.5. Standards of apprenticeship.

An apprenticeship program to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work process in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is recommended. Such instruction may be given in a classroom through trade or industrial courses, or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice

to the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provision of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR Part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

§ 29.6 Apprenticeship agreement.

The apprenticeship agreement shall contain explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth of apprentice.

(c) Name and address of the program sponsor and registration agency.

(d) A statement of the trade or craft in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing (1) the number of hours to be spent by the apprentice in work on the job, and (2) the number of hours to be spent in related and supplemental instruction which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid the apprentice and whether or not the required school time shall be compensated.

(h) Statements providing:

(1) For a specific period of probation during which the apprenticeship agreement may be terminated by either party to the agreement upon written notice to the registration agency;

(2) That, after the probationary period, the agreement may be cancelled at the request of the apprentice, or may be suspended, cancelled, or terminated by the sponsor, for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as it exists on the date of the agreement and as it may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established trade procedure or applicable collective bargaining provisions.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition by the SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with ap-

plicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in: (i) The State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship program is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR Part 30, as amended, and to require apprenticeship programs to

operate in conformity with such State Plan and 29 CFR Part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in "apprenticeable" occupations as defined in § 29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide that under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgment of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of

its application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State Apprenticeship Agency/Council desiring recognition shall submit to the Administrator, BAT, the documentation specified in § 29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the documentation specified in § 29.12(a) of this part on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by § 29.12 (a). The recognition of currently recognized Agencies/Councils shall continue until July 18, 1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny the application;

(2) The date of the Administrtor's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.* (1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity

in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR Part 30, as amended.

5. Section 212 of Title 8 of the California Code of Regulations, 8 C.C.R. § 212, provides as follows:

Apprenticeship programs shall be established by written standards approved by the Chief DAS. The standards shall be approved only when they cover all work performed within the apprenticeable occupation, conform to applicable law, and contain:

(a) Evidence of:

(1) work site facilities and equipment sufficient to train the apprentice(s);

(2) skilled workers as trainers at the work site(s);

(3) adequate arrangements for related and supplemental instruction pursuant to Labor Code Section 3074;

(4) ability to offer training and supervision in all work processes of the apprenticeable occupation(s);

(5) provisions for evaluation of on-the-job training and related and supplemental instruction;

(b) A statement of the:

(1) occupation(s);

(2) party or parties to whom the standards apply and the geographic area;

(3) definition and duties of the apprentice;

(4) working conditions of the apprentice;

(5) current applicable journeyman wage or wages;

(6) ratio or number of apprentices to be employed and the method of determining such ratio;

(7) mechanism that will be used to provide apprentices with reasonably continuous employment in the event of a lay-off or the inability of an employer to provide training in all work processes as outlined in the standards;

(8) requirement for incorporating the provisions of the standards into the apprentice agreement.

(c) Provisions for:

(1) establishment of an apprenticeship committee if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program;

(4) determining the qualifications of employers if other than single employer programs;

(5) determining the qualifications of apprentice applicants;

(6) an apprentice worksite job progress and related and supplemental instruction record system;

7) graduated minimum wage schedules to be paid during the term of training, and applied uniformly to all employers subject to the standards, as applicable;

(A) wage progression schedule shall be in accordance with the collective bargaining agreement, if contained therein;

(B) where the program is not subject to collective bargaining, the wage progression schedule shall be determined by the program sponsor in consultation with the Division of Apprenticeship Standards and shall in no case be less than ten percent (10%) per year, when the entry wage is based on fifty percent (50%) of the current journeyman wage.

(8) discipline of apprentices and including provisions for fair hearings;

(9) termination or recommendation of cancellation of apprentice agreements;

(10) recommending issuance of State Certificates of Completion of Apprenticeship pursuant to Section 224 of this Chapter;

(11) revision of standards;

(12) training and education of the apprentice in first aid, safe working practices and in the recognition of occupational health and safety hazards;

(13) fair and impartial treatment of applicants for apprenticeship, selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215 of this Chapter;

(14) mobility between employers when essential to provide exposure and training in various work processes in the apprenticeable occupation;

(15) approval of the standards by the Chief DAS.

(d) The names and signatures of the parties.

No. 89-1985

IN THE

Supreme Court of the United States

October Term, 1989

CALIFORNIA DIVISION OF
APPRENTICESHIP STANDARDS;
GAIL W. JESSWEIN,
Chief of the Division of Apprenticeship Standards;
CALIFORNIA APPRENTICESHIP COUNCIL;
and NORTHERN CALIFORNIA BOILERMAKERS
LOCAL JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

HYDROSTORAGE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KAREN E. FORD
(Counsel of Record)
JAMES P. BAKER
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940
Attorneys for Respondent

QUESTION PRESENTED

1. Whether the State of California's conduct in enforcing California Labor Code section 1777.5 as applied in this case is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*?

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES CITED

OTHER AUTHORITIES — PAGE(S)

PARTIES TO THE PROCEEDING

The named Appellants in the United States Court of Appeals for the Ninth Circuit were the California Division of Apprenticeship Standards ("DAS"); Gail W. Jesswein, Chief of the Division of Apprenticeship Standards; the California Apprenticeship Council; and the Northern California Boilermakers Local Joint Apprenticeship Committee ("JAC").

The Appellee in the Court of Appeals was Hydrostorage, Inc., a Tennessee corporation. Hydrostorage, Inc. is a wholly owned subsidiary of the Pitt-Des Moines, Inc. Pitt-Des Moines has no parent corporation. Pitt-Des Moines's non-wholly owned subsidiaries are Oregon Culvert Co., Inc. and Canadian Des Moines Industries Limited.

No. 89-1985

IN THE

Supreme Court of the United States

October Term, 1989

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS;
GAIL W. JESSWEIN,
Chief of the Division of Apprenticeship Standards;
CALIFORNIA APPRENTICESHIP COUNCIL;
and NORTHERN CALIFORNIA BOILERMAKERS
LOCAL JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

HYDROSTORAGE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Hydrostorage, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 891 F.2d 719.

COUNTERSTATEMENT OF THE CASE[1]

I

STATEMENT OF THE CASE

In summary, Hydrostorage is a Tennessee corporation which performs public works projects in various states including California. Hydrostorage is not signatory to an agreement with the Boilermakers Union and the Boilermakers Union has never been certified as the bargaining representative of its employees. Pursuant to California Labor Code section 1777.5, the Division of Apprenticeship Standards and the other Petitioners in this action attempted to force and require Hydrostorage to participate in the apprenticeship training program operated by the Boilermakers Union. Petitioners sought to compel Hydrostorage to execute an agreement to train apprentices with the Boilermakers apprenticeship program (known as a DAS-7) and to employ apprentices referred from the Boilermakers hiring hall in accordance with the Boilermakers apprenticeship program. The Boilermakers apprenticeship program would require Hydrostorage to employ one apprentice for every five journeymen on the job. The DAS-7 agreement to train apprentices also sets the wages, hours and working conditions for apprentices, incorporating by reference the terms and conditions of the local collective bargaining agreement negotiated by the Boilermakers Union and various union signatory companies.

There was a serious question presented as to whether the project in question was of sufficient size to meet the statutory minimum for the employment of apprentices. Nonetheless, Hydrostorage was fined and debarred for its failure to submit a DAS-7 form and a request for approval to train apprentices from the apprenticeship program operated by the Boilermakers Union. Hydrostorage challenged the actions of the Division of Apprenticeship Standards and the other Petitioners on the grounds that such state law

---

[1] Hydrostorage, Inc. ("Hydrostorage") adopts the Statement of the Case found in the opinion of the United States Court of Appeals for the Ninth Circuit at *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), which is reprinted in the separately bound appendix to Petitioner's certiorari petition (hereafter referred to as "Pet. App.") at pages 2a-9a.

mandates are preempted by ERISA and on the further ground that the actions of the Petitioners were no more than an attempt to force Hydrostorage to become bound involuntarily to the results of collective bargaining by the Union. The District Court ruled in favor of Hydrostorage on both issues. The Ninth Circuit upheld the decision of the District Court on the issue of ERISA preemption and did not reach the question of NLRA preemption.

A. The Decision Below.

In *Hydrostorage*, the Ninth Circuit summarized ERISA's connection to apprenticeship as follows:

> ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both (29 U.S.C. § 1002(3); *Morash*, 109 S.Ct. at 1672). The statute defines "employee welfare benefit plan" as follows: "*any plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance *or otherwise*, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . ." (29 U.S.C. § 1002(1); emphasis added). [Footnote omitted.]
>
> ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . . (29 U.S.C. § 1144(a) (emphasis added).) "State laws" are defined as "all laws, decisions, rules, regulations

> or other State action having the effect of law, of any State." (29 U.S.C. § 1144(c)(1).) A "state" is defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." (29 U.S.C. § 1144(c)(2).)

Hydrostorage, 891 F.2d at 726, Pet. App. at pp. 14a-15a.

After setting forth the above-quoted statutory basis, the Ninth Circuit concluded that the case before it involved an ERISA plan. Under authority of *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1217 (9th Cir.), *aff'd*, U.S. , 109 S.Ct. 210 (1988), and the parties' stipulation, the court easily concluded that the Boilermakers apprenticeship trust fund is an ERISA plan. The court also separately held that the written Apprenticeship Standards which set out the terms and conditions of the Boilermakers apprenticeship program constitutes an employee benefit plan under ERISA. *Hydrostorage, supra*, Pet. App. pp. 17a-19a.

After concluding that the case does involve ERISA covered employee benefit plans, the court then reviewed whether the administrative order challenged was a "state law" that "relate[s] to" such a plan. Pet. App. at 21a. The court quickly determined that the order was a "state law" under ERISA. *Id.* The court went on to conclude that the order "clearly 'relates to' the Standards, which are part of an ERISA plan." *Id.* at p. 22a. The order penalized Hydrostorage for failing to sign the DAS-7 agreement under which Hydrostorage would have been bound to the Boilermakers Apprenticeship Standards. As such, the court concluded that "the order undoubtedly 'relates to' an ERISA plan in the sense that the order has a 'connection with or reference to' the Standards." *Id.* The court also found that the order " 'purports to regulate, indirectly or directly,' an ERISA plan." *Id.* It stated:

> Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan.

> [Citation] The order is designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order is based, California Labor Code § 1777.5. *Section 1775.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans.* The underlying statute is therefore one which is specifically designed to affect employee benefit plans. [Citation.] We therefore conclude that the administrative order falls within ERISA's preemption clause.

Id. at pp. 22a-23a (emphasis added).

Finally, the court concluded that ERISA section 514(d) did not save the order from preemption. *Id.* at 24a-28a. That section, codified at 29 U.S.C. § 1144(d), states that courts should not construe ERISA "to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." In particular, the court rejected a claim that the state apprenticeship standards had been incorporated into the federal regulatory scheme under the Fitzgerald Act, 29 U.S.C. § 50. *Id.* at 25a. In reaching its conclusion, the Ninth Circuit adopted the district court's reasoning. *Id.* The district court summarized:

> The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. (29 U.S.C. § 50.) The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration for certain Federal purposes, [of] acceptable apprenticeship programs." (29 C.F.R. § 29.1(b).) Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired."

Pet. App. at p. 38a.

II

SUMMARY OF ARGUMENT

Petitioners seek review of the decision below on fundamentally three grounds. First, Petitioners contend that this Court should grant review in order to resolve an alleged conflict in the circuits as to whether the standard for ERISA preemption requires that statutes not only relate to, but also purport to regulate ERISA plans. As set forth in full below, there really is not a conflict in the circuits. Rather, Petitioners have relied upon theories asserted several years ago which have since been called into serious question, if not eradicated by subsequent decisions of this Court. More to the point, this issue is irrelevant to this case. It is unquestionable that the statute here not only relates to ERISA plans but also purports to regulate them. Accordingly, under either test the state law at issue here would be preempted. Thus, the distinction is irrelevant and cannot provide a basis for review.

The second issue raised by Petitioners is whether the state law at issue here is indeed a "regulation" or whether it simply constitutes an exercise of choice by the state as to which contractors it chooses to do business with. As discussed in full below, this so-called "market participation" argument fails for two reasons. First, it is factually inaccurate. The statute at question here does not involve eligibility for bidding but rather direct regulation of contractors in the performance of public works projects. In fact, the statute in question does not even come into effect until *after* the contracts are already let. The regulatory scheme involves ongoing monitoring by the state and encompasses penalties such as fines and debarment orders which are totally inconsistent with Petitioner's so-called "market participant" theory. Moreover, the precise argument Petitioners raise has been squarely rejected by this Court in *Wisconsin Dep't of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

Finally, Petitioners argue that the state law at issue here is saved from preemption by the existence of a federal statute, the Fitzgerald Act. Even a cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. The

Fitzgerald Act is only four sentences in length and has no substantive provisions at all. It is simply a general policy statement acknowledging the benefits of apprenticeship programs. It was also enacted some 37 years before ERISA and can hardly be viewed as a Congressional limitation on the scope of ERISA. The federal regulations on which Petitioners rely are also irrelevant here. According to their terms, these regulations are established for the sole purpose of setting out federal labor standards concerning apprentices and the only role of the state is as an agent for the federal government in verifying compliance with these federal standards and registering programs for the U.S. Department of Labor. Most significantly nothing in the federal law requires or even hints at the requirement set out by the state law here. As this Court held in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), a state statute which is enacted under the umbrella of a federal enabling act is safe from preemption only to the extent that it is a mechanism for enforcing the affirmative requirements of federal law. Where as here the state statute imposes requirements not imposed by federal law, those requirements are subject to preemption. Thus, the federal law exemption argument is likewise without merit.

III

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The First Question Presented In The Petition.

The first Question Presented in the Petition (page (i)) is:

> Whether the states are precluded by the preemption provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1144, from requiring that public works contractors agree to provide training opportunities for apprentices in accord with state-prescribed standards.

The Ninth Circuit, however, did not decide that question in this proceeding and the record here will not support a determination of that question in this case. The Ninth Circuit explained:

> We conclude that the Council's order is not saved from preemption by Section 514(d) of ERISA. We also hold that as applied in the Council's order, [Labor Code] Section 1777.5 is not saved from ERISA preemption. However, like the district court, we do not address whether Section 1777.5 in its entirety is preempted by ERISA. 685 F. Supp. at 723.

Pet. App. at pp. 27a-28a. The Ninth Circuit did not even find that the statute in question, California Labor Code section 1777.5, was preempted, but only that as it was applied in this case it was preempted. Id. Put simply, the Ninth Circuit did not reach the question of whether and to what extent states are precluded by the preemption provisions of ERISA from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards.

To invoke this Court's Article III powers, Petitioners must demonstrate standing in a constitutional sense. To demonstrate its standing, Petitioners must allege and prove three elements: (1) personal injury; (2) fairly traceable to the Defendants' allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The record here does not permit resolution of the first Question Presented by the Petitioners because the order below is limited to the enforcement mechanisms of California Labor Code section 1777.5 as they were applied in this case. Here, the state did not simply set minimum standards for employment and training of apprentices. It mandated that a particular benefit be provided, it selected the specific union-sponsored program in which Hydrostorage was compelled to participate and mandated by regulation and by enforcement of the Standards every detail of employment and training of

apprentices. This is not a minimum standards requirement but a mandated program dictated in its every detail by the state. It is this mandate that the employer sign an agreement with and participate in a specific program selected by the state which was held to be preempted. The record in this case is barren of any issue as to whether ERISA preempts states from setting generally applicable minimum employment requirements on public works projects. Thus, the first "Question Presented" argued by Petitioners simply cannot be resolved in the context of this case. The first Question Presented is nothing more than a pure hypothetical which was neither presented by the facts of this case nor discussed in the courts below.

B. The "Purports to Regulate" Question Raised By Petitioners Runs Directly Contrary To The Well Established Decisions Of This Court And Is Completely Irrelevant To This Action.

Petitioner devotes four pages to the argument that the decision below should be reviewed in order to "resolve the substantial confusion that has developed in the court of appeals law over the proper role—and the proper construction—of ERISA section 514(c)(2) in preemption litigation generally." Pet. at p. 11. The issue Petitioner refers to is whether or not a statute must not only "relate to" but also must "purport to regulate" ERISA plans for ERISA preemption to apply.

The attempt to insert this additional requirement into the standard for ERISA preemption is directly contrary to numerous decisions of this Court. As this Court pointed out in Shaw, 463 U.S. at 96-98, the statutory test is simply whether the state law in question "relates to" an employee benefit plan:

> Congress used the words "relate to" in Section 514(a) in their broad sense. To interpret Section 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of Section 514.

* * *

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or a reference to such a plan.

The narrowing of the standard proposed by Petitioners here, requiring that the statute also "purport to regulate" ERISA plans, flies in the face of this simple and straightforward standard. Furthermore, it is clear that this Court has never applied such a limitation. For example, in a very recent decision, *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S. 825 (1988), a unanimous Supreme Court held that a state statute which exempted ERISA benefit funds from garnishment was preempted by ERISA. Such a statute does not "purport to regulate" ERISA plans and, indeed, was an attempt to protect and exclude ERISA plans from state regulation. Nonetheless, the statute was held preempted because, like the state law in question here, it made specific reference to and was specifically designed to affect ERISA plans. Id. at 829. Thus, the "confusion" which Petitioners assert simply does not exist. A statute which relates to ERISA plans is preempted and there is no requirement that it also "purport to regulate" such plans.[2]

Even more significantly, the distinction itself is irrelevant in this case because, as the court below quite properly found, the order challenged here meets the "purports to regulate" test. Under the narrowest application of the statute urged by Petitioners, the order would still be preempted by ERISA because it undeniably "purports to regulate" apprenticeship plans.

This Court in its summary affirmation of *Local Union 598, Plumbers & Pipefitters Journeymen and Apprentices Training Fund v. The J. A. Jones Construction Co.*, 846 F.2d

[2] The strained statutory construction upon which Petitioners rely is simply without merit. The "purports to regulate" language is drawn from the definition of a state agency. It is not part of the preemption section of ERISA. It is set out in the definitions of terms. More significantly, the term that Section 514(c)(2) defines ("state" as opposed to "state law") is not used in Section 514(a). The definition of a state as opposed to a state law is simply not an issue in interpreting Section 514(a). Accordingly, Petitioners' entire argument is essentially an irrational reading of the statutory language.

1213 (9th Cir.), aff'd, U.S. 109 S. Ct. 210 (1988), resolved this same issue as to a very similar statute. In *J. A. Jones,* the Ninth Circuit specifically held that ERISA preempts the State of Washington's prevailing wage law which required contributions to an apprenticeship training fund because such mandatory participation "purports to regulate" ERISA benefits. The statute and the plan were very similar to those presented in *Hydrostorage.* In *J. A. Jones,* the Ninth Circuit concluded:

> However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan" in too tenuous, remote, or peripheral a manner to warrant a finding that "the law relates to" the plan. Gilbert, 765 F.2d at 327 (quoting Shaw, 463 U.S. at 100 n.21, 103 S. Ct. at 2901, n.21). Such, assuredly, is not the case here.
>
> * * *
>
> In conclusion, the clear and express purpose of Washington Revised Code section 39.12.010(3) is to govern employee contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans.

Id. at 1221.

In the decision below, the Ninth Circuit explained:

> Second, *we conclude that the administrative order "purports to regulate, indirectly or directly," an ERISA plan. Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan. See Metropolitan Life [Insurance Co. v. Massachusetts],* 471 U.S. [724,] 739, 105 S. Ct. at 2388 (Massachusetts law requiring ERISA plans to provide minimum coverage for mental health care expenses "bears indirectly but substantially" on plans since "it requires them to purchase the mental-health benefits specified in the statute"). *The order is*

> *designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order was based, California Labor Code 1777.5. Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The underlying statute is therefore one which is specifically designed to affect employee benefit plans.* [Citation omitted.] We therefore conclude that the administrative order falls within ERISA's preemption clause.

Pet. App. at pp. 22a-23a (emphasis added).

A law "purports to regulate" an employee benefit plan if it attempts "to reach in one way or another" the "terms and conditions of employee benefit plans." *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984) (quoting 29 U.S.C. section 1144(c)(2)). It is clear that by mandating Hydrostorage to participate in the Boilermakers' apprenticeship program and comply with the Boilermakers' Apprenticeship Standards in the course of performance of public contracts, the State of California is "reaching in one way or another" the terms and conditions of an employee benefit plan. Failure to comply with these requirements subject the Respondent to a fine and a debarment order. California Labor Code section 1777.5 obliges employers to make contributions and to follow the other terms of the apprenticeship plan which is enforced by a state administrative agency, the Division of Apprenticeship Standards ("DAS"). The DAS undertakes ongoing regulation during the completion of the public work project of the number of apprentices and the terms and conditions under which they are employed. It cannot be disputed that this constitutes administrative regulation by the state.

Thus, in the decision below, Petitioners have already received the benefit of what they perceive to be the narrow "purports to regulate" analysis. Accordingly, the distinction Petitioners urge is irrelevant here. The order at issue here is preempted under either test.

C. There Is No Conflict Between The Circuits Which Would Affect The Decision Below.

Petitioners have also failed to show any conflict or real confusion among the circuits concerning whether the standards for ERISA preemption are affected by the definition of a state agency set out in Section 514(c)(2). In support of their argument that the definition of a state agency set out in Section 514(c)(2) should be read to limit the scope of ERISA preemption under Section 514(a), Petitioners rely primarily upon three cases, two from the Ninth Circuit and one from the Second Circuit, decided in 1984 and 1986. Hydrostorage submits that the reasoning of these cases has clearly been overruled by more recent decisions of this Court which have held that the test is simply whether the state statute "relates to" ERISA plans and not whether the statute also "purports to regulate" such plans. The holdings in all of the recent decisions of this Court substantially undermine, if not eradicate, the theories discussed in the older decisions upon which Petitioners rely. *See Mackey,* 486 U.S. 825; *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41 (1987); *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58 (1987). All of the other decisions upon which Petitioners rely simply hold, in agreement with the Ninth Circuit Court of Appeals in *J.A. Jones,* 846 F.2d 1213, that any statute which regulates ERISA benefits, by definition, also relates to the plans. *See, e.g., Stone and Webster Engineering Corporation v. Ilsley,* 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom., Arcudi v. Stone and Webster Engineering Corp.,* 463 U.S. 1220 (1983). Thus, the asserted "conflict between the circuits" is non-existent. The few older decisions supporting the "purports to regulate" limitation are of questionable validity and the entire theory appears to have been abandoned, at least in practice, by the more recent decisions of this Court and the courts of appeal.

The most Petitioners can muster concerning the "disarray" and "confusion" among the circuits is the following:

> The Sixth Circuit, *without deciding the question,* has criticized the view that "purports to regulate" language of section 514(c)(2) provides a substantive

> limitation on the scope of section 514(a). [Citation omitted.]

Pet. at p. 14 n.12 (emphasis added). Such a tenuous disagreement on an issue which is not even relevant to the outcome below can hardly provide a proper ground for review by this Court.

Petitioners' attempt to distinguish this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), is unavailing. *See* Petition at p. 12 n. 9. In *Alessi*, this Court explained the scope of ERISA section 514(c)(2) as follows:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the preemption provision, ERISA defines the term "State" to include: "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. section 1144(c)(2) (emphasis added.) ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Id. at 525 (emphasis in original).

Similarly, the State of California's attempt to impose the terms and conditions of an ERISA plan, in this case collectively bargained Apprenticeship Standards, upon nonsignatory contractors must, at minimum, be said to be a statute indirectly regulating such ERISA plans.

D. Petitioners' "Market Participant" Theory Is Without Merit And Has Previously Been Rejected By This Court.

Petitioners argue that their actions in connection with Hydrostorage and indeed all of Labor Code Section 1777.5 are not a "regulation" but simply reflect the state exercising

freedom of choice as to which contractors it chooses to deal with. In rejecting this "market participant" argument, the Ninth Circuit explained:

> First, as the Supreme Court observed in rejecting a similar argument in a case involving NLRA preemption, *Wisconsin Department of Industry, Labor and Human Relations v. Gould,* 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986), "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." Id. at 289, 106 S. Ct. at 1062; *see also id.* at 290, 106 S. Ct. at 1063 ("what the Commerce Clause would permit states to do in the absence of the NLRA is . . . an entirely different question from what states may do with the Act in place.")

Pet. App. at 23a.

Petitioners' "market participant" argument completely misses the point. Although California is a party to contracts in the public works market, it is also engaged in active regulation of public works contractors. As a review of Labor Code Section 1777.5 reveals, it is designed to regulate conduct and does not even purport to set qualifications for bidders. By mandating that after executing a contract to perform a public works project, Hydrostorage must sign an agreement with, participate in, and make contributions to the Boilermakers apprenticeship plan, the State is regulating the Company's conduct.

Further, the "market participation" argument ignores the fact that debarment is not the only penalty. Section 1777.7 provides for fines and other penalties for non-compliance.

The argument also ignores the fact that Section 1777.5 subjects the employer to mandatory ongoing obligations. The employer has an ongoing statutory obligation to make contributions and to follow the other terms of the plan which is enforced by a state administrative agency, the DAS. The DAS is not an awarding body and does not award or enter into public works contracts. Rather, the role of the DAS is solely to regulate the conduct of public works contractors with regard to apprenticeship. The DAS undertakes ongoing

regulation of the number of apprentices and the terms under which they are employed. Such ongoing administrative regulation can hardly be characterized as a simple market choice between one contractor and another. Indeed, the provisions of section 1777.5 *by their terms do not take effect until after the contract has been awarded.* In short, Petitioners' contention that the State of California's debarring Hydrostorage and *assessing fines* against Hydrostorage are no more than "market participation" by the State of California stands reason on its head. Moreover, numerous courts have rejected such arguments, holding that where a state conditions doing business with a private entity on compliance with statutory requirements it is regulating conduct.

Finally, this "market participation" argument has been squarely rejected by this Court. Petitioners dance in and around this Court's decision in *Gould*, 475 U.S. 282, without ever fully quoting the most pertinent part of that decision:

> In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. . . . The NLRA, in contrast, was designed in large part to "entrust administration of the labor policy for the nation to a centralized administrative agency." *Garmon*, 359 U.S. at 242, 79 S. Ct. at 778. . . . *What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what states may do with the Act in place.* . . . [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Id. at 289-290 (emphasis added) (citations omitted).

What the Commerce Clause would permit states to do in the absence of ERISA is an entirely different question from what states may do with the Act in place. By mandating that Hydrostorage participate in the Boilermakers' apprenticeship program, the State of California is regulating employee benefit plans, a form of state regulation prohibited by the express terms of ERISA. Accordingly, as this Court held in *Gould*, and as the Ninth Circuit held below, Petitioners' market participation argument is without merit.

Even according to Petitioners' own analysis, the "market participant" exception does not apply here. Petitioners argue that the three principles in *Gould* are: (1) Congressional purpose based on an examination of the statute in question; (2) whether the state has a legitimate procurement purpose; and (3) maintaining a national marketplace in which parties can freely operate. Pet. at pp. 17-18.

Petitioners' market participation argument must fail under all of these three "principles" gleaned by Petitioners from this Court's decision in *Gould*. First, the Congressional intent that ERISA preempt "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" is beyond question. In *Franchise Tax Bd. of The State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 24 n.26 (1983), this court explained:

> In addition, ERISA's legislative history indicates that, in light of the Act's virtually unique pre-emption provision, see section 514, 29 U.S.C. § 1144, "A body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits).

Again, in *Shaw*, 463 U.S. 85, this Court quoted the legislative history of ERISA:

> Representative Dent, for example stated:
>
> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. 120 Cong. Rec. 29197 (1974)."

Id. at 99. It is thus clear that the Congressional purpose in enacting ERISA was to reserve the regulation of employee benefits to federal authority. *Id.*

As to the second principle, Labor Code section 1777.5 cannot plausibly be defended as a legitimate response to State procurement constraints or to local economic needs. Labor Code section 1777.5 is regulation, pure and simple. Moreover, its admitted purpose is to promote apprenticeship which the State views as a valuable social goal. It is neither the mere expression of "local economic needs" nor is it simply a "procurement restraint." It is not a business decision but rather an exercise of police power to further the State's social objectives.

Under the third principle, preserving the enforcement of Labor Code section 1777.5 as applied in this case would not further the interests of the "national market-place." Each state under Petitioners' theory would be given free reign to set its own terms and conditions for participation in apprenticeship plans. As Senator Javits explained during the legislative debate over ERISA, "[t]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29,942 (1974) (remarks of Senator Javits) (quoted in *Shaw*, 463 U.S. at 99-100 n.20). Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the Congressional purpose of "eliminating the threat

of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974) (remarks of Senator Williams) (quoted in *Shaw*, 463 U.S. at 99). Thus, the goal of national uniformity and a free market place is served, not hindered, by preemption of inconsistent state regulations.

E. ERISA Section 514(d) And The Fitzgerald Act Do Not Save California Labor Code Section 1777.5 From Preemption As *Applied In This Case.*

ERISA Section 514(d) clarifies the scope of ERISA preemption as follows:

> Nothing in this Title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 111 and 507(b)) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d).

Thus, Section 514(d) makes clear that ERISA preempts only state laws and not federal laws. To be protected from preemption under 514(d), Labor Code Section 1777.5 would have to be elevated to the status of a federal law. Nothing presented by Petitioners suggests any appropriate basis for doing so. Nevertheless, Petitioners devote numerous pages of briefing to the exclusion in a frantic attempt to make ERISA Section 514(d) the *deus ex machina* that will save Labor Code Section 1777.5 from preemption.

Petitioners lead us down the slippery slope of their argument by first extolling the virtues of apprenticeship. Petition at p. 9. Petitioners then argue that a federal statute known as the Fitzgerald Act (29 U.S.C. § 50) saves Labor Code § 1777.5 from preemption relying on ERISA Section 514(d)—the federal law savings clause. Petition at pp. 23-26. In other words, Petitioners argue that the Fitzgerald Act transforms Labor Code Section § 1777.5 into a federal law. Even a cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. The Fitzgerald Act is only

four sentences in length and has no *substantive provisions at all.* It is simply a general policy statement acknowledging the benefits of apprenticeship programs. It was also enacted in 1937, some 37 years before ERISA. Thus, it can hardly be viewed as an intentional Congressional limitation on the scope of ERISA and its "virtually unique preemption provision." *Franchise Tax Board,* 463 U.S. at 24 n.26.

Likewise, the federal regulations on which Petitioners place so much reliance are irrelevant here. According to their own terms, the regulations are established for the purpose of setting forth *federal labor standards* concerning apprentices and to "extend the application of those standards by prescribing policies and procedures concerning *registration for certain federal purposes,* of acceptable apprenticeship programs, with the U.S. Department of Labor. . . ." 29 C.F.R. § 29.1(b) (emphasis added). The regulations do not, as Petitioners imply, give the states *carte blanche* or indeed any authority to establish independent apprenticeship requirements. Rather, the regulations establish *federal* standards for apprenticeship programs which control the circumstances under which an apprenticeship program may be registered with the U.S. Department of Labor. The only state function is to act as the agent of the federal government in verifying compliance with these *federal* standards and in registering the programs with the U.S. Department of Labor. Further, and more significantly, there is no mandatory federal requirement. The federal regulations do not require any employer to have an apprenticeship program or authorize any state to impose such a requirement. Thus, because Section 1777.5 has nothing to do with federal registration of apprenticeship programs, the regulations on which Petitioners rely are irrelevant for purposes of the federal law savings clause. Further, nothing in the federal law requires or even hints at mandatory participation by employers.

This Court in *Shaw,* 463 U.S. 85, in analyzing ERISA's federal law exclusion under 514(d), observed:

> ERISA's structure and legislative history, while not particularly illuminating with respect to section 514(d), caution against applying it too expansively.

> As we have detailed above, Congress applied the principle of preemption "in its broadest sense to foreclose any non-federal regulation of employee benefit plant," creating only very limited exceptions to preemption. 120 Congressional Record 29197 (1974) (remarks of Representative Dent); *see id.*, at 29933 (remarks of Senator Williams).
>
> *_*_*_*
>
> While section 514(d) may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive preemption provision and its enumeration of narrow, specific exemptions to that provision makes us reluctant to expand section 514(d) into a more general saving clause.

Id. at 104.

Thus, it is well established that where a state statute is enacted under the umbrella of a federal enabling act, it is saved from preemption by Section 514(d) of ERISA only to the extent that it is a mechanism for enforcing the affirmative requirements of federal law. Where, as here, the state statute imposes requirements not imposed by the federal law, those requirements are subject to preemption.

Further, the fact that overall Congressional policy recognizes the benefits of well-run apprenticeship programs does not give the states leave to regulate in pursuit of that goal. In *McMahon v. McDowell,* 794 F.2d 100 (3d Cir.), *cert. denied,* 479 U.S. 971 (1986), the Third Circuit rejected a similar argument based on the asserted laudable goals of the state law which was clearly in conformance with overall federal policy. The court ruled: "*Shaw and Metropolitan Life* make it very clear that state laws relating to a covered plan, even those that are arguably consistent with the goals of ERISA, are preempted by Section 514(a), 29 U.S.C. 1144(a)." Id. at 108. As this Court held in *Mackey v. Lanier,* 486 U.S. at 830, a state law is not saved by "legislative good intentions."

This Court in *Shaw*, 463 U.S. 85, concluded its analysis of ERISA Section 514(d) by observing:

> To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of Congressional choice and should be addressed by Congressional action. *To give section 514(d) the broad construction advocated by appellants would defeat the intent of Congress to provide comprehensive preemption of state law.*

Id. at 106 (emphasis added).

The Ninth Circuit and the district court in their opinions below, forcefully dismissed the argument that Section 514(d) saved Section 1777.5 from preemption:

> By no stretch of the imagination could section 1777.5 be considered a state law the preemption of which would impair federal law. The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices' and related objectives. 29 U.S.C. § 50 . . . the regulations relate only to eligibility for federal registration. Neither they nor the act itself contemplate enforcement mechanisms
>
> *_*_*
>
> Accordingly, it must be concluded that section 514(d) does not save the order issued under section 1777.5 from ERISA preemption.

Pet App: 25a; 38-39a.

Petitioners' argument that state statutes that "go beyond federal minimums" are not necessarily preempted by ERISA (Pet. at p. 24) was expressly rejected by this Court in *Shaw*. This position was reiterated in *Mackey v. Lanier*, 486 U.S. at 829-830, where the Supreme Court explained:

> [t]he preemption provision [of section 514(a)] . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Insurance Co. v. Massachusetts,*

> *supra,* 471 U.S. at 739, 105 S. Ct. at 2389 . . . legislative "good intentions" do not save a state law within the broad preemptive scope of section 514(a).

The analysis by Petitioners contrasting the Job Training Partnership Act and the Occupational Safety and Health Act to the Fitzgerald Act and to Labor Code Section 1777.5 is meaningless because there is no issue of ERISA preemption involved in the former situation. The argument is a blatant attempt to draw this Court's attention away from the extensive body of law concerning the only issue involved in this case, the scope and interpretation of ERISA Section 514(a). The court in *Solomon v. Klein,* 770 F.2d 352 (3d Cir. 1985), rejected an attempt to argue by analogy with respect to ERISA by examining Congressional intent concerning some other statute. It ruled:

> The method of analogy is, of course, a legitimate method of reaching of a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.

Id. at 354-355.

Moreover, the impact of Petitioners' theory would be to create a statutory exception to ERISA for apprenticeship programs. In essence, adoption of this completely novel theory would erase the term "apprenticeship" from the definition of "employee welfare benefit plans" set forth in Section 3(1) of ERISA. Not only is this a ridiculous statutory construction but the Ninth Circuit Court of Appeals and the United States Supreme Court have held apprenticeship plans to fall within the scope of ERISA and ERISA preemption. *See J.A. Jones,* 846 F.2d at 1217. Certainly a policy statement enacted 37 years before ERISA cannot be deemed to modify ERISA's plain language.

Contrary to the impression Petitioners attempt to create, it is clear that Congress specifically chose not to provide a general exemption from preemption for state apprenticeship

regulation. Congress chose to provide such exceptions for state laws which regulate insurance banking and securities and for generally applicable criminal laws (*see* ERISA Section 514(b)). ERISA also exempts from its coverage governmental plans, church plans, and plans maintained solely for the purpose of complying with applicable workers' compensation, unemployment compensation or disability insurance laws (*see* ERISA Section 4(b)). However, nowhere does ERISA provide any type of exception for state regulation of apprenticeship. Because it is obvious that Congress carefully considered the concept of providing exceptions to preemption and chose not to except apprenticeship programs, this Court is not free to add such an exception by judicial fiat. As the Court noted in *Shaw*, 463 U.S. at 104 "the combination of Congress' enactment of 514(a)'s all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision militate against expanding § 514(d) into a more general savings clause." Thus, Petitioners' argument that the existence of the National Apprenticeship Act indicates a Congressional intent to permit the states to regulate apprenticeship notwithstanding the broad preemptive effect of ERISA is without merit.

IV

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the judgment below should be affirmed.

DATED: July 16, 1990

Respectfully submitted,

KAREN E. FORD
(Counsel of Record)
JAMES P. BAKER

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693

Telephone: (415) 433-1940

Attorneys for HYDROSTORAGE, INC.,
Respondent.

No. 89-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL, and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

DAVID A. ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94108

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street. N.W.
Washington, D.C. 20006
(202) 637-5390

Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900

Attorneys for California State Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1985

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL, and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

In its Brief in Opposition, respondent misstates the first question presented, mischaracterizes the decision below, and misrepresents the statutory scheme involved in this case.

1. Respondent's first reason for opposing *certiorari* is that "the Ninth Circuit did not reach the question of whether and to what extent states are precluded by the preemption provisions of ERISA from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards."

Respondent's Brief in Opposition ("Op. Br.") at 8. The plain language of the Ninth Circuit's opinion is precisely to the opposite.[1]

The Ninth Circuit held that the State's order at issue is preempted *because* that order requires certain employers to abide by state-mandated apprenticeship standards, and, according to the Ninth Circuit, the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, preempts such an order even though the order's requirements apply only to contractors on public works projects:

> Hydrostorage was sanctioned for failing to apply . . . for permission to train apprentices on the Lathrop project. The very purpose of requiring

---

[1] Cal. Labor Code § 1777.5 is several pages long (Pet. App. 50a-53a) and covers many issues concerning the employment of apprentices on public works jobs other than the requirement that public works employers must agree to apply state-approved standards for hiring and training apprentices.

The Ninth Circuit had no reason to, and did not, adjudicate in this case any of those other aspects of § 1777.5, including: the provision that employers *may* employ "properly registered apprentices" upon public works if they choose to do so (Pet. App. 50a); the provision that apprentices "shall be employed only at the work of the craft or trade to which he is registered" (*id.*); the provision that joint apprenticeship committees "administering the apprenticeship standards . . . in the area of the site of the public work" ensure equal employment opportunity and affirmative action for women and minorities (Pet. App. 51a); and the provision requiring that in some instances contractors on public works jobs make payments to the California Apprenticeship Council, a state entity, to support apprenticeship programs (Pet. App. 53a). (The page number cites are the only ones available, since the relevant paragraphs and sentences of § 1777.5 are not preceded by numbers or letters.)

The Ninth Circuit, understandably, limited its preemption holding to the issues raised by the actual order before that court, and therefore did not purport to address the validity of every one of the many separate aspects of § 1777.5, including those not raised by the order being contested. Pet. App. 28a. But as shown in the text the Ninth Circuit *did* directly address the issue raised by the first question we have presented to this Court, since that Question *is* squarely raised by the order respondent contests.

> Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan. . . . By signing a DAS-7 form, Hydrostorage would agree "to train apprentices in the designated occupation in accordance with the *apprentice standards*" . . . . The "apprenticeship standards" in this case are the Standards, an ERISA plan. Thus, the order undoubtedly "relates to" an ERISA plan . . . .
>
> Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards. . . . We therefore conclude that the administrative order falls within ERISA's preemption clause. [Pet. App. 22a-23a (emphasis in original).][2]

---

[2] Contrary to its contention before this Court that the Ninth Circuit held preempted *only* the requirement that "the employer sign an agreement with and participate in a specific program selected by the state" (Op. Br. at 9), Respondent has recently relied on the Ninth Circuit's ERISA preemption decision in this case as standing for a broader preemptive proposition. *See* Comment on Behalf of Hydrostorage Concerning Proposed New Amendments for Title 8; Ch. 2, Part I, California Code of Regulations Sections 201 and 227 Through 234. In objecting to proposed regulations by the California Apprenticeship Council designed to comply with the Ninth Circuit's decision in this case, Hydrostorage stated:

> The new proposed [regulation] permits contractors to request the dispatch of apprentices while stating that they will not follow applicable apprenticeship committee standards. Instead, the contractor agrees:
>
> > "To employ and train apprentices in accordance with the California Apprenticeship Council regulations governing employment of apprentices in public works projects."
>
> This simply means that every aspect of employment and training of apprentices will be under the direct control of state regulation. Such a system is certainly equally subject to a claim of ERISA preemption as that challenged in *Hydrostorage*. Further, the new proposed regulations continue to require a specific ratio of apprentices to journeymen. As found . . . in *Hydrostorage*, this kind of regulation of apprenticeship training programs is not permitted to the states. Thus, the current regulations directly contradict the holdings of the . . . Ninth Circuit . . . in *Hydrostorage*. [*Id.* at 5.]

The only clue in the Brief in Opposition as to why respondent believes, despite this explicit statement by the Ninth Circuit, that the court below did not decide "whether states are precluded . . . from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards" is the statement that "the state did not simply set *minimum* standards for employment and training of apprentices." Opp. Br. 8-9 (emphasis supplied); *see also id.* at 9 (emphasis supplied) ("This is not a *minimum* standards requirement but a mandated program dictated in its every detail by the state.")

Neither our *Certiorari* Petition's first Question Presented nor the Petition itself, however, anywhere refers to "minimum" standards, as opposed to "mandated" or any other kind of standards. Rather, our basic point is that *ERISA does not preempt at all* the setting of standards for apprenticeship programs where the standards only apply to work to be performed by employees on state construction projects. Setting such standards for public works contracts, we maintain, simply is not state action that "purports to regulate" within the meaning of § 514(c)(2) of ERISA.[3]

The Ninth Circuit rejected this construction of the statute (Pet. App. 23a), and thereby held that ERISA *does* preempt statutes that simply prescribe and enforce contract terms for doing business set by the state as purchaser in the market place. It is this square holding

---

[3] For example, when a state project is put out for bids, the building specifications included in the bid documents are not merely "minimums", but instead set out the precise standards which must be followed if the contract is awarded. Thus, if the document calls for a three story building one block square, the contractor cannot decide to build a six story building half a block square. Yet, one would not say that the state is "regulating" the height and breadth its own building; rather, the state is simply deciding what it wants built and how, contracting to have it built that way, and holding the contractor to the terms of its contract.

of the Ninth Circuit that we believe merits this Court's review.

2. The respondent's next two grounds for resisting *certiorari* are its assertions that (i) there is no conflict in, or confusion among, the circuits on whether the "purports to regulate" language of ERISA § 514(c)(2) in fact limits ERISA's preemptive scope; and (ii) even if there is, that split is immaterial because those courts that have given independent meaning to § 514(c)(2) are interpreting ERISA in a manner "directly contrary to decisions of this Court." Opp. Br. at 9. The first assertion is contrary to fact; the second, if true, would support rather than detract from the need for this Court to address the role of § 514(c)(2) in ERISA preemption analysis.

(i) The assertion that there is no circuit confusion or conflict on the question presented here is based upon the fact that *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) and *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986)—the cases that originally established that ERISA § 514(c)(2) states a separate preemption requirement and thereby limits the "relates to" language of § 514(a)—were decided in 1984 and 1986, and those cases have been superseded by later cases in this Court.

But neither the Second nor the Ninth Circuit have repudiated their earlier opinions in this regard. Indeed, the Ninth Circuit used the two-prong test battle in this case, and, in a case decided after the *Certiorari* Petition in this case was filed: *Retirement Fund Trust etc. v. Franchise Tax Board, et al.*, —— F.2d ——, —— (9th Cir., Nos. 88-6355 & 88-6415, July 16, 1990) the test for ERISA preemption encompasses *both* the "relates to" requirement of § 514(a) and the "purports to regulate" requirement of § 514(c)(2). *See also General Electric*

v. Department of Labor, 891 F.2d 24, 29 (2nd Cir. 1989), *cert. denied*, —— U.S. ——, 58 L.W. 3767 (June 4, 1990) (stating the § 514(c)(2) "purports to regulate" standard is part of ERISA's preemption test).

Moreover, the Fifth Circuit, only months ago, recognized that "the Ninth and Second Circuits have read § 514(c)(2)'s definition of 'state' to impose a limitation upon the 'relate to' language of § 514(a)". *Ironworkers v. Mid-South Pension Fund v. Terotechnology*, 891 F.2d 548, 552-53 (5th Cir. 1990). The Fifth Circuit without deciding whether that view is correct then applied the two-prong test to the case before it. *Id.* at 553; *see also Retirement Fund Trust, supra*, at n. 63 ("Not all courts have adopted this two-part test. *See Ironworkers* [*,supra*]; *Authier v. Ginsberg*, 757 F.2d 796, 799 n.4 (6th Cir., *cert. denied*, 474 U.S. 888 (1985)."); *Firestone v. Neusser*, 810 F.2d 550, 552-53 n.1 (6th Cir. 1987).

Thus, respondent's representations to the contrary notwithstanding, the two-prong theory of ERISA preemption certainly has not been abandoned by the circuits that had adopted that theory, and continues to perplex those circuits that have not yet squarely decided the issue.

(ii) It is respondent's position, however, that even if (as we established above) there is indeed circuit confusion and conflict upon the question whether there are two separate requirements for establishing ERISA preemption or only one, this Court should leave the circuit court law in disarray. According to Hydrostorage, the better view is that under this Court's cases, the circuits that apply only a single-pronged, "relates to" test are correct.

We would have thought this point to be one that argues *for certiorari*. Obviously, where a circuit conflict is the basis of a *certiorari* grant, this Court usually

adopts—with or without some elaboration or modification—one side of the split as the correct legal rule. The very reason for granting review in such cases is to restore uniformity among the circuits by informing all the lower courts of the correct legal rule.

Equally to the point, while we, of course, disagree that this Court's cases establish that the two-prong ERISA preempted theory is wrong, that position, if true, *supports* a grant of *certiorari*.[4] One basis for *certiorari* jurisdiction is "|w|hen . . . a United States court of appeal[] has decided . . . a federal question in a way that conflicts with the applicable decision of this Court." Rule 10.1 (c). The Ninth Circuit in this case *did* apply a two-prong theory of ERISA preemption, albeit, in our view, in a manner that does not do full justice to the

---

[4] This Court has never considered directly a case raising the question whether ERISA § 514(c)(2) limits the operation of the ERISA preemption provision as a whole. Moreover, this Court has had no need to decide the issue since, in most cases, the result will be the same with or without the addition to the § 514(a) "relates to" test of § 514(c)(2)'s "purports to regulate" test. Only in the narrow but important class of cases, such as this one, in which a statute "relates to" an employee benefit plan but in no sense "regulates" the terms and conditions of that plan, does § 514(c)(2) place a limitation upon the operation of ERISA preemption that alters the outcome of the case.

The primary case respondent relies upon to demonstrate that this Court's cases are inconsistent with the two-prong theory is *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988). Op. Br. at 10. It does not appear, however, that the relevance of § 514(c)(2) was ever argued to the Court in *Mackey*, and that section is certainly not addressed in the relevant portion of the opinion. Further, under the interpretation of the "purport to regulate" provision for which we argued below and which we would present here were certiorari granted, the statute involved in *Mackey would* "purport to regulate" employee benefit plans, since that state statute established rules applicable to all employee benefit plans in the state, and was not limited to stating the terms upon which government entities would participtae in the marketplace.

"purport to regulate" prong.[5] Thus, if respondent is correct that this Court's cases are inconsistent with viewing § 514(c)(2) as placing *any* limitation upon the "relates to" standard of § 514(a), there is all the more reason to grant *certiorari* in this case.

3. Finally, respondent, taking issue with the analysis presented at pp. 15-21 of our *Certiorari* Petition, maintains that ERISA *does* preempt the California statute here, even though that statute governs only the work performed on public works projects. Op. Br. 15-16. We do not believe that anything respondent argues in this regard provides any warrant for reiterating our basic legal position, and therefore confine this reply to the following two points.

First, respondent is simply wrong in stating that "the provisions of section 1777.5 *by their terms do not take*

---

[5] Because we agree with the Ninth Circuit that § 514(c)(2) has a separate role to play in ERISA preemption analysis but disagree with the exact meaning that court ascribes to the section, it is *not* true, as respondent suggests, that "[u]nder the narrowest application of the statute urged by Petitioners, the order would still be preempted by ERISA because it undeniably 'purports to regulate' apprenticeship plans." Op. Br. 10-11. The Ninth Circuit's construction ignores the distinction between "regulation" and state market place participation, as we explain in our *Certiorari* Petition (at 15-21).

Nor does this Court's summary affirmance after the filing of a jurisdictional statement in *Local Union 598, Plumbers & Pipefitters Journeymen & Apprentices Training Fund v. The J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir.), *affirmed* —— U.S. ——, 109 S. Ct. 210 (1988) suggest that this Court has accepted the construction the Ninth Circuit has placed upon the "purports to regulate" prong of the ERISA preemption standard. The Ninth Circuit opinion in *J.A. Jones* did not discuss whether the state's role as market participant precluded a finding that the state was "regulating" the contractors who agreed to its contracting terms. Consequently, this Court's summary affirmance, which must be construed as narrowly focused upon the issues actually raised and decided below, did not address that question either. *See Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

effect until after the contract has been awarded." Op. Br. at 15, 16 (emphasis in original). The statute provides:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor. [Pet. App. 53a.]

Further, the contract Hydrostorage signed did contain provisions binding Hydrostorage to abide by the requirements set by § 1777.5. Answer, Attachment A, p.1c ("*Apprenticeship Requirements*: Contractor agrees to comply with Section 1777.5, 1777.6 and 1777.7 of the California Labor Code relating to the employment of apprentices. . . .")

Second, respondent (like the Ninth Circuit) maintains that the State is "regulating" public works contractors because the statute "subjects the employer to mandatory ongoing obligations" and provides for penalties other than debarment, including fines. Opp. Br. 15-16; *see also* Pet. App. 23a (the State is regulating public works contractors because "[t]he state's involvement does not end with the awarding of the contract" but, instead, includes "monitor[ing] and enforc[ing] violations . . .").

But *all* executory contracts establish "ongoing obligations"—ongoing, at least, until the terms of the contract have been fulfilled, which is the duration of the obligations established by § 1777.5.[7] Yet, one does not ordinarily say that a party that contracts for the performance of services is "regulating" the service provider by enforcing complete performance according to the contrac-

---

[7] That is, nothing in the statute requires public works contractors to employ and train apprentices, or to abide by any particular apprenticeship standards, before or after the particular public works project covered by the contract is over.

tual terms, or by collecting pre-set penalties for a failure to perform as promised.

In short, the statutory scheme here at issue simply states one of the services California wishes all public works contractors to supply—*viz.*, providing training opportunities for state-registered apprentices—and specifies how that service is to be provided. As such, the scheme is no more "regulation" than are the blueprints for the building projects or the time schedules established for completing those projects.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

DAVID A. ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94108

MARSHA S. BERZON
ROBERT C. BELL, JR.
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street. N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Northern California Boilermakers Local Joint Apprenticeship Committee

JOHN M. REA
(Counsel of Record)
JAMES D. FISHER
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
P.O. Box 603
San Francisco, CA 94101
(415) 737-2900
Attorneys for California State Petitioners